

THE
PRACTICE
OF THE
COURTS
OF
King's Bench and Common Pleas.

ORIGINALLY COMPILED
BY GEORGE CROMPTON, Esq.

REVISED, CORRECTED, AND NEWLY ARRANGED,
BY BAKER JOHN SELLON,
SERJEANT AT LAW.

THE SECOND EDITION,
WITH THE
Addition of the MODERN CASES to the PRESENT TIME, and
a PRACTICAL TREATISE on the Mode of PASSING FINES
and SUFFERING RECOVERIES.

IN TWO VOLUMES.
VOL. II.

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WITH ADDITIONS OF THE MANNER OF THE WRITING THEM, AND
A PRACTICAL TREATISE ON THE MANNER OF WRITING THEM,
AND SHIRTING, &c.

IN TWO VOLUMES.



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FOR A. BENTLEY, ST. MARTIN'S LANE.

T A B L E

OF THE

C O N T E N T S

OF THE

SECOND VOLUME.

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Of Amendments and Revisions

CHAP. XXI.

Of Printing Presses and Revisions

THE
PRACTICE
OF THE
COURTS

OF

King's Bench and Common Pleas.

CHAPTER XIII.

Of Proceedings by and against particular Persons.

SEC. 1. *Against Peers and Members of Parliament.*

SEC. 2. *By and against Attornies and other Officers of the Courts.*

SEC. 3. *Against Prisoners.*

SEC. 4. *Against Bail upon their Recognizances.*

SEC. 5. *By and against Infants.*

SEC. 6. *By and against Justices, Constables, Revenue Officers, &c.*

SEC. 7. *By and against Corporations.*

SEC. 8. *Against Hundredors.*

SEC. 9. *By Paupers.*

SECTION I.

Of Proceedings against Peers and Members of Parliament.

THE proceedings against peers and members of parliament are at present regulated by two statutes, the one 12 & 13 W. 3. c. 3. and the other 10 Geo. 3. c. 50. 1

Regulated by
stat. 12 & 13
W. 3. & 10 G. 3.

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the

the first mentions in what way they are to be proceeded against, and also confines such proceedings to a certain period after the dissolution, prorogation, or adjournment, and before the meeting of any parliament; by the last act they may be proceeded against at any time, and the process by *disringas* to compel their appearance is rendered more effectual.

The mode of proceeding.

Whether courts have jurisdiction against peers by bill.

The mode of proceeding is either by original writ or original bill.

Whether the courts had jurisdiction against peers and members of parliament by original bill before the statute of William, or whether even now they possess it, is yet a matter of doubt.

It was indeed holden in the case of *Say and Lord Byron*, and again in *Gosling* and *Lord Weymouth*, which was in the 18 Geo. 3. that a peer could be sued in the King's Bench by bill, and that it was the uniform practice, even before the statute of William, which made no difference in respect of jurisdiction. Say. 63. Cowp. 845.

So, in the Common Pleas, the jurisdiction of proceeding against a member of parliament by bill seemed established in the case of *Dawson and Burridge*, *Ld. Ray*. 1442. Str. 734.

But in a very late case the authorities of *Say* and *Byron* and *Gosling* and *Weymouth* (which last came before the court on a demurrer to a plea in abatement) have been impeached, and held not decisive upon the subject; and the question of jurisdiction has been again set afloat, and it is still undecided, whether the King's Bench has jurisdiction against a peer by bill; but it is settled, that if any one does proceed by bill, and the defendant does not plead such want of jurisdiction in abatement, that it is afterwards too late to take advantage of it. *Earl of Londale v. Littledale* in error, 2 H. Blac. 299. to which case the reader is referred, as containing much information on the subject.

At all events if sued by bill it must be pleaded in abatement.

Peers, &c. not to be arrested.

The persons of peers and members of parliament are by the statutes privileged from arrests, for the extent of which privilege, see *ante*, vol. I. ch. 2. (B. 2).

How to proceed by Bill.

Of proceedings by bill.

Engross bill on treble 1d. stamp parchment; file it with clerk of declarations in B. R.; get it signed by prothonotary in C. B.; then file it with filazer of the proper county, (i. e.) where the venue is laid; sue out a writ of summons to be engrossed on 2s. 6d. stamp parchment, signed by signer of writs in B. R.; pay 1s. 8d. by filazer in C. B., sealing 7d.; take it to sheriff of the county where venue is laid, to whom it is directed; get his summons for the officer to serve; pay sheriff 2s. 4d.; officer for serving summons, 5s.

Sec. I.] PEERS AND MEMBERS OF PARLIAMENT.

If defendant not to be found in that county, sue out a *testatum* summons. Imp. K. B. 847.

If no Appearance.

If defendant do not appear within four days after return of writ, get return of summons; and if sheriff has given notice, sue out *distingas* to be engrossed on 2s. 6d. stamp parchment, signed by signer of writs in B. R. and filazer in C. B. pay 1s. 8d.; sealing 7d.; get warrant thereon, pay 2s. 4d.; give same to officer to levy, pay him 10s. If no appearance on return of *distingas*, get it returned from sheriff and sue out an *alias*; move to increase the issues, then issue a *pluries distingas* and move again to increase the issues, so on until enough is levied to cover your demand; after which move the court on the stat. of 10 Geo. 3. c. 50. for the application of the issues to the discharge of your debt and costs.

How if defendant does not appear.

If no goods in county where *venue* is laid, get *nihil* returned on first *distingas* and issue *testatum* into custody where goods are.

If Defendant appears.

Defendant must appear within four days after the return of the writ of summons; or if *distingas* issues, on the return day of the *distingas*.

How if defendant appears.

His appearance is effected by filing common bail in K. B. with clerk of bails; in C. B. with filazer; on entering appearance file memorandum of warrant to defend; then deliver declaration, (which in some respects differs from common declaration (a),) and proceed as in other cases.

How to proceed by Original.

Peers and members of parliament cannot be proceeded against by original writ in B. R. in all actions, but in those only (such as case, trespass, ejectment, replevin, and debt) which the King's Bench can hold plea of by original writ.

Of proceedings by original.

If the plaintiff proceeds by original, against a peer or commoner, the plaintiff makes out a *præcipe* as instructions for

(a) The only difference is, that in the beginning declaration states, A. B. complains of C. D. Earl or Duke of F., as the title may be; or if only a member, complains of C. D. (having privilege of parliament) of a plea, &c.

And in the breach, if it be an action upon promises, the words (craftily and subtilly to deceive and defraud) are omitted; and also after the word *suit* is added, and hereupon the said (plaintiff) prays the process of our lord the king, according to the form of the statute in such case made and provided to him thereon to be made, and it is granted to him, &c. Pledges, &c.

the curſtor to frame the original writ. This writ muſt then be delivered to the ſheriff, who will make out a ſummons thereon; give ſummons to your officer to leave at defendant's houſe. A copy of the original is uſually made out by plaintiff's attorney for the ſheriff, and that is ſerved as the ſummons on the defendant.

Upon the return of the original, it is filed with the filazer, if in B. R.; or *cuſtos brevium*, if in C. B.; and if the defendant appears, the proceedings are the ſame as in other caſes.

Whether an eſſoin may be caſt.

Formerly inſtead of appearing he might caſt an eſſoin; but this is now much diſcouraged by the courts, and almoſt rendered obſolete, though, I take it, it may ſtill in certain actions be done. See vol. I. p. 7.

Should no appearance be entered with the filazer within four days after the *quarto die poſt* of the return of the original, or eſſoin caſt, the plaintiff's attorney makes out a *præcipe* for a *diſtringas*, and carries it to the proper filazer to draw out the ſame; it is ſigned and ſealed: get a warrant thereon, which give to officer to levy; the firſt levy is 40s.

Of the diſtringas and increaſing iſſues.

If the defendant does not appear on the *quarto die poſt* of the return of the *diſtringas*, the plaintiff's attorney muſt call upon the ſheriff to return the writ: whereupon he may ſue out an *alias*, and upon the return of that, a *pluries diſtringas*. But inſtead of proceeding as formerly by the writ of *diſtringas ad inſinitum*, the plaintiff may now move the court, out of which the writ iſſues by virtue of the 10 Geo. 3. c. 50. ſ. 3. for the ſheriff to enlarge the iſſues, which the court will accordingly order to be increaſed to the amount of the plaintiff's demand.

If no appearance entered on the *quarto die poſt* of laſt *diſtringas*, move the court in purſuance of ſtatute, that iſſues may be ſold and paid over to plaintiff.

If defendant appears, the appearance is entered with the filazer, by delivering it on a piece of paper. Middleſex, appearance for A. Earl of B. at the ſuit of C. D. T. S. attorney.

Pay for entering 2s. 6d.; deliver alſo memorandum of warrant; if 40s. has been levied, call on the officer for it; and if he will not pay, get certificate from filazer of defendant's appearance; and if he ſtill refuſes, judge on ſummons will compel him. Imp. K. B. 525.

Of the Motion to apply the Iſſues according to Statute.

Of applying the iſſues.

The motion is (whether proceedings be by bill or original writ) for a rule to ſhew cauſe, " why the iſſues returned upon the ſeveral writs of *diſtringas* ſhould not be ſold, and

" the monies arising from the sale thereof should not be forthwith brought into court; and why it should not be referred to the Master to tax the plaintiff his costs, occasioned by his issuing out the said several writs; and why the costs, when taxed, should not be paid out of the monies so brought into court; and why the surplus of the said money, after payment of the said costs, should not be retained in court, until the purpose of the said writs is answered." Fee to counsel, 10s. 6d. This is moved upon an affidavit of the several writs of *distringas* having issued, and the returns thereto, and that the defendant hath not appeared; draw up rule; serve copy on sheriff; shew the original rule; move the court on an affidavit of the service, and shewing the original rule to make it absolute; draw up rule; serve copy on the sheriff; shew the original, and if he does not bring the money into court, he will be liable to an attachment. Make out bill of costs, and tax them with the Master.

Nature of motion for that purpose.

All the proceedings against a peer or privileged person subsequent to the declaration, are the same as in other cases, except that their bodies cannot be taken in execution, unless the judgment is obtained upon a statute staple, or statute merchant, or upon the statute of acton-burnell 11 Edw. 1.; and then a *copias ad satisfaciendum* lies even against peers of the realm. 2 Crom. 142.

Of the proceedings subsequent to declaration.

How if Peer or Member be in actual Custody.

If a person having privilege of parliament be in the King's Bench prison, as under sentence of the court on a criminal information or the like, there is no occasion of filing a bill against him, as having privilege, and issuing a summons and the like; but plaintiff may, without any summons, file a bill against him, as being in the custody of the marshal; but he cannot charge him in custody upon any bailable action, nor can he afterwards charge him in execution. *Jackson v. Moreth*, 5 D. & E. 361.

Of proceeding against a peer in custody.

OBSERVATIONS.

In the King's Bench the summons and its subsequent process, attachment, and *distringas*, when the suit is by bill, do not state the cause of action at large, but only generally, as "to answer the said A. B. in a plea of trespass on the case to his damage of," &c. or that he render to the said A. B. 1000*l.* as the case is. Whereas if the suit is by original, the subsequent process of *distringas* thereon state the cause at large

What the summons and mesne process should state if proceedings by bill;

if by original.

Of the teste and
return of such
process.

large as in the original writ. And in C. B. whether the proceedings are by bill or original, all the process thereon states the whole as in the original bill or writ filed. 2 Crorp. 138. But contra, Imp. C. B. 585.

The summons and other process when by bill, need not have fifteen days between the *teste* and return, but must be made returnable on a day certain. But when by original, they must have fifteen days between the *teste* and return, and must be made returnable on a general return.

Of the power of
court as to in-
creasing issues.

On motion to increase issues, it is discretionary in the court to order the amount; and they may order to the full amount on the first motion, if they think proper. Bar. 418. 420. And the course of the King's Bench is now, on motion, to order the amount of the whole debt to be levied on the *alias*.

How if defend-
ant appears after
distringas issued,
but nothing
levied.

The plaintiff, in an action against a member of parliament, had proceeded agreeable to the act of 10 Geo. 3. c. 50. and had obtained rules for selling the issues levied upon a *distringas*, *alias*, and *pluries*, and also a rule for an attachment against the sheriff, but no issues had been actually levied; and at length defendant appeared; whereupon it was moved, that these rules should all be discharged. For as no issues had been levied, they could not be sold (*vide* f. 3. of the stat. 10 Geo. 3. c. 50.); and as the defendant in the action had now appeared, the end and purpose of the writs were answered. On the other side the plaintiff insisted on the costs of issuing the writs before the rules should be discharged; and the court thought that reasonable, and directed, that on payment of costs the rules should be discharged. They were of opinion, that these costs were not to attend the event of the suit, but were to be paid to the plaintiff at all events, whether he should finally succeed in his suit or not. *Martin v. Townsend and Sawbridge*, Burr. 2725.

Upon what
terms he will be
let in.

Qu. Whether court will not also in such case lay defendant under terms to plead issuably, take short notice, &c. as he applies for a favour after having delayed plaintiff by his own laches? Imp. K. B. 486.

The statute 10
Geo. 3. extends
to all writs of
distringas gene-
rally.

The statute 10 Geo. 3. extends to all writs of *distringas* in general, not merely to such as are issued against peers and members of parliament; as to cases of *distringas* against a late sheriff for not bringing in the body, &c. Burr. 2726.

Proceedings
against a peer
irregular if
otherwise than
as above.

If a peer or member of parliament be proceeded against otherwise than as above directed, the proceedings will be irregular, and will be set aside, or the defendant, if arrested, will be discharged upon motion. See vol. I. ch. 2. (D).

But

But this summary remedy seems to be, where it appears on the record that the defendant is a peer, or has privilege. Otherwise the court will put defendant to his plea of privilege and prayer for a *superfedeas*, or will expect some further evidence of the fact than a mere affidavit, if he wishes to be relieved on motion.

When in such case defendant will be discharged on motion, and when he must plead his privilege.

As where a member of parliament had been held to special bail, and moved to be discharged on common bail, the court will not grant a rule to shew cause upon an affidavit only: but upon the attendance of the clerk of the crown or his deputy, with the sheriff's return, they ordered the rule to go. *Fennick v. Fennick*, 2 Blac. 788.

So, on a motion made by Lord Banbury for a *superfedeas* to a *latitat*, which had issued against him by the name of Charles Knollys, the court denied the motion, and the Chief Justice said, they could not take notice that this Charles Knollys is Earl of Banbury; and that there was a difference between this case and the case of a peer that had sat in the House; for if his lordship had ever been summoned to parliament, and had a writ to shew, and there was no dispute about the identity of the person, it would have been reasonable to have granted *superfedeas*. But in this case of a lord that has never sat there, they could not do it, for they could not try peerage on a motion; but his lordship might plead it and pray a *superfedeas*; and *per* Powel, if in the writ he had been named peer, it would have been supereded. Vent. 298. Ld. Ray. 1247. Salk. 512.

The court will not grant an attachment against a peer for not paying money pursuant to an award, though the defendant consent upon condition that it lies in the office a certain time. *Walker v. Earl of Grosvenor*, 7 D. & E. 171.

SECTION II.

Of Proceedings by and against Attornies.

Attornies, as officers of the courts to which they respectively belong, and as being under the necessity of attending there for the purpose of conducting the business of their clients, are upon that account entitled to certain privileges when plaintiffs or defendants in an action.

What privileges attornies entitled to.

As plaintiffs, they may sue by a particular process of the courts, called an attachment of privilege, and may try their cause at Westminster, let the nature of the action be what it may. And as defendants, they must be sued, not by the common writ of *latitat* or *capias*, but by bill, and in the

court to which they belong, nor are their persons liable to be arrested on *mesne* process.

For the nature and extent of this privilege, see *post* Observations to this section.

Of Proceeding by an Attorney Plaintiff.

Get attachment of privilege (which may be had as other blank writs) on 2 s. 6 d. stamp; fill it up.

Form of Attachment in K. B.

Attachment.

George the Third, &c. to the Sheriff of Middlesex greeting: We command you that you attach C. D. and E. F. (any number of defendants not exceeding four may be put in this writ), if they may be found in your bailiwick, and them safely keep, so that you may have their bodies before us at Westminster, on next after (a day certain in term, and not a general return day), to answer T. S. gentleman, being one of the attornies of our court, before us, according to the liberties and privileges of such attornies and other ministers of the same court, from time whereof the memory of man is not to the contrary, used and approved in the same court of a plea of trespass, (or whatsoever the action is,) and have there this writ.

Witness, &c.

In C. B. the attachment is similar, *mutatis mutandis*.

Then make out *Præcipe* thus:

Præcipe.

Middlesex attachment of privilege for T. S. gentleman, one of the attornies, &c. against C. D. defendant, returned Wednesday next after the Morrow of All Souls.

21st October 1795.

Affidavit for 100 l.

No more than four defendants must be put in *præcipe* or attachment.

Carry writ and *præcipe* to signer of writs in K. B. or prothonotary in C. B., who will sign same *gratis*; and in C. B. the writ must be marked by clerk of warrants. In both courts, attachment must be sealed.

The above proceedings are ordered by the following rules of court:

B. R.

By Reg. H. 20 Geo. 2. every attorney of this court who shall sue out any attachment of privilege against any defendant, shall leave a præcipe with the signer of the writs with the defendants names, not exceeding four in each writ, with the return and day of signing

such

C. B.

By Reg. H. 11 Geo. 2. you must take out a præcipe containing the plaintiffs and defendants names, not exceeding four in the whole, with the return of the writ, day of signing, and the agent's or attorney's name who sues out the same: this præcipe you

Rule of court respecting the præcipe.

such writ, with the agent's or attorney's name who sued out the same. And all such præcipes shall be entered on the roll, where the præcipes of latitat and all other writs issuing out of this court are entered, and the officer who signs the writs in this court shall not sign such attachment till a præcipe be left with him for that purpose.

you must leave with the prothonotary, who, without fee or reward, is to enter the same on a remembrance roll, to be kept in his office for that purpose, and he is not to sign any attachment of privilege, unless such præcipe be left in his office at the time of signing thereof.

No attachment of privilege to be sealed unless the same be first stamped or signed by the clerk of the warrants of this court or his deputy, for which no fee is to be paid, so the intent to shew that such person is an attorney of this court, duly entered and continued on the roll of attorneys; and if not signed by the clerk of the warrants or his deputy, the same shall be of no force or require bail. R. T. 9 W. 3.

Rule in C. B. as to attachment being signed by clerk of warrants.

If attachment issues without præcipe being left or signed by clerk of warrants as above, it will be set aside with costs. *Frogatt v. Tapscot*, 2 Blac 919.

Above rules must be observed.

If the attachment requires only a common appearance, a copy must be served with notice as in other cases. If the party is to be held to bail, the sum sworn to must be marked on the back of the writ, and also the day it is sued out; but the attorney's name need not be indorsed thereon, the stat. 2 Geo. 2. c. 23. s. 22. not extending to cases where attorney is plaintiff, but only where they sue for a third person. *Fields one, &c. v. Lewen*, 4 T. R. 275.

How the attachment must be if bailable or not.

Nor need the *ac etiam* be inserted, though it may be usual so to do, but it is sufficient to mention the nature of the action, as in a plea of trespass on the case, debt, &c. the same as if process was not bailable. The stat. of 13 Car. 2. stat. 2. c. 2. which directs the *ac etiam*, particularly excepting attachments of privilege. 2 Wil. 392.

Ac etiam need not be inserted.

In C. B. the attachment must have fifteen days between the *teste* and return. Bar. 410.

Of the *teste* and return of attachment; its nature.

In B. R. an attachment of privilege is but as a *latitat* and not as an original. 1 Show. 367.

But it is there held in the nature of an original writ, and may be pleaded to without continuances till the declaration. *Finch v. Wilson one, &c.* of C. B. in error. 1 Wil. 167.

But an attachment of privilege is amendable though it is in the nature of an original writ, as if there are not fifteen days between the *teste* and return, &c. 1 Wil. 167.

In

In another case it has been said that an attachment of privilege in C. B. is not like an original writ, and therefore plaintiff may put several defendants into one attachment, and declare against them severally. King's Rep. 38.

The fact is, it is strictly neither an original nor a *capias*, it answers the purposes of both, it warrants the proceedings as well as brings the party into court.

Thus although after judgment by default on common process, plaintiff may sue out a special original to warrant it in case error should be brought; yet an attorney has no need to sue out a new attachment of privilege to warrant his judgment. For where judgment was obtained against one defendant on a joint attachment of privilege against him and others, and he brought error, the court said, (upon denying leave to take out a separate attachment to warrant a judgment,) that by the practice of C. B. the old joint attachment seemed to be good and sufficient to warrant proceedings thereon, against defendants severally, as would be reported to the King's Bench, if they desired to be informed what was the practice in C. B. *Vide Bar. 423. Dixon v. Atkinson.*

B. R.

C. B.

How attachment served if action not bailable, or special bail taken in bailable action.

If the attachment in B. R. requires only a common appearance, a copy thereof is served with an English notice in writing subscribed as in other cases, and the appearance must be entered with the clerk of the common bail.

If it requires special bail, a judge's clerk takes the recognizance as in other cases.

If the attachment in C. B. requires only common bail after a copy thereof served with an English notice in writing, subscribed as in other cases, the appearance must be entered with the prothonotary; but if it requires special bail, the clerk of the docket prepares the bail-piece or recognizance, and attends a judge of the court, where the same is entered into and the bail justified, or fresh bail is added in the same manner as the filaxer does on *income process* by original.

Of the declaration.

Engross declaration on treble 1 d. stamp paper, the form thereof is the same as in other cases, except the beginning, which may be thus:

In B. R.

C. B.

Form thereof.

Middlesex, to wit: A. B. gentleman, one of the attorneys of the court of our Lord the King, before the King himself, complaining against C. D. being in the custody of the marshal of the Marshal's sea,

C. D. late of, &c. was attached by a writ of our Lord the King, of privilege issuing out of our court here to answer against A. B. gentleman, one of the attorneys of the court of our Lord the King,

Sec. II.] BY AND AGAINST ATTORNIES.

11

See, &c. (as in other declarations). Add pledges, to the liberties and privileges of the same court, for such attorneys and other ministers of the same Bench, time out of mind, used and approved of in the same, in a plea of trespass on the case, &c. and thereupon the said A. B. in his proper person, complains, &c. Add pledges.

The subsequent proceedings at the suit of an attorney are the same as in other cases, and in the writs of inquiry or execution, he is described as in declaration.

If an attorney delivers his declaration four days exclusive, before the end of the term in which attachment is returnable, the defendant must plead as of that term.

If an attorney delivers his declaration four days exclusive before the end of the term in which the attachment was returnable, and enters a rule to plead, and demands a plea, the defendant shall be obliged to plead as of that term; and if he does not deliver his declaration in that time, the defendant is entitled to an imparlance.

And if he does not deliver his declaration before the effoin day of the subsequent term, the defendant may have an imparlance to the term next following.

Of proceeding against an Attorney Defendant in K. B.

Prepare bill (which is the same as the declaration, and only differs from common cases in the beginning (a)) engross it on parchment with a treble *1d.* stamp; file it with clerk of declarations in K. B. office; make a copy thereof on treble *1d.* stamp paper; this is to serve as the declaration; deliver it to the attorney or his known agent, and indorse thereon notice to plead; charge nothing for declaration.

The indorsement may be thus, "This is a true copy of a bill filed against you, as of this present Michaelmas term; and unless you plead thereto in four days from the date hereof, judgment will be signed against you by default."

(a) A bill against an attorney is in the following form: Middlesex, to wit. A. B. complains against C. D. gentleman, one of the attorneys of the court of our Lord the King, before the King himself, present here in court in his own proper person, for that, Whereas, &c. (as in other cases), and therefore he prays relief, &c.

T. S. for the plaintiff.

The defendant in person.

Pledges to prosecute,

John Doe,
and
Richard Roe.

This

Of the subsequent proceedings.

When defendant must plead to declaration.

How to proceed against attorney in K. B.

Of indorsing declaration with notice to plead.

Regulated according to time of delivery of declaration.

This is upon the supposition that the bill be filed four days exclusive before the end of the term, otherwise defendant will be entitled to an imparlance, and notice to plead should be within first four days of next term.

Four days always sufficient.

Four days time to plead is sufficient in all cases, though the attorney live above 20 miles from London, as he is supposed to be always present in court. *Mann v. Fletcher*, 5 D. & E. 369.

It used to be eight days, if above 20 miles, or venue in another county.

Of the subsequent proceedings if defendant appears.

If defendant appears and pleads proceed to issue, as in other cases, charge him for his own entries on delivery of issue, but not for plaintiff's.

If he does not appear.

If he does not appear give a rule to plead, and make a demand of plea which must be done, and sign judgment, and proceed with inquiry (if judgment not final) as in other cases.

Remedy against attorneys quick in K. B.

Thus in K. B. the remedy against attorneys is much speedier than in C. B., which see *infra*; and indeed quicker than in ordinary cases against common persons, as the declaration is immediately delivered on filing bill, without any delay of mesne process.

Of proceeding against an Attorney Defendant in C. B.

How to proceed against an attorney in C. B.

An attorney of the Common Pleas also must be sued by bill, but the bill and declaration against an attorney are different in this court; the former being only to compel an appearance, and the latter not delivered till that is effected. By Reg. Trin. 21 Car. 2. "No bill shall be filed against an officer, attorney, clerk, or minister of the court, in order to a forejudger, until the bill be actually entered on record, and a number roll actually put to the bill."

Rule Trin. 21 Car. 2. of entering bill on record.

Now out of use.

The above rule, however, is in a great measure disused, and the method of proceeding at this day against an attorney defendant is as follows:

The plaintiff engrosses his bill on a slip of parchment stamped with a treble 1d. stamp, and carries it to the prothonotary, who marks it as entered, on being paid for the entry; and it is thereby supposed to be entered, though no number roll is put on the bill; which being done, the bill must be carried to Westminster Hall, and given to one of the criers of the court, who calls the defendant in court, for which he is paid 1s.; and he must be called three times in court. *Cooke's Rep.* 4. After which the plaintiff gives a rule on the bill with the secondary for the defendant to appear, for which he is paid 1s. 4d. viz. 1s. duty, and 4d. the

the rule; and then the bill is filed in the prothonotary's office, for which is paid 4d., upon filing which bill, notice thereof must be given to the defendant in writing, by Reg. Hil. 11 Geo. 2. whereby it is ordered, that—

“Where a bill shall be filed against an attorney of the court, no forejudger shall be entered for want of appearance; if the action be laid in London or Middlesex, and the attorney resides within twenty miles of London, until four days after notice in writing of filing such bill be given to such attorney, or his agent, or left at his usual place of abode, and a rule given for such appearance as usual; and if such attorney resides above twenty miles from London, or the action be in any other county than London or Middlesex, no forejudger shall be entered till eight days after such notice shall be given, in manner as aforesaid, and a rule to appear; the said days to be exclusive of the days of giving such notice.”

Rule Hil. 11 G.
2. as to giving
notice of filing
bill.

The notice of a bill being filed:

Common Pleas,

A. B.

against

C. D. gentleman, one of the attornies, &c.

Take notice that a bill was this day filed in the prothonotary's office of his majesty's court of Common Pleas at Westminster, against you the defendant, C. D., at the suit of the plaintiff A. B., in an action of trespass upon the case upon several promises, (or whatever it is,) and unless you appear to the said bill on Wednesday the twenty-seventh day of November instant, you will be forejudged the court.

23d Nov. 1795.

O. P. Attorney for
the Plaintiff.

To C. D. the defendant.

Form of such
notice.

Before the above rule for giving the defendant notice, the plaintiff did nothing more than have him called by the crier in court, which was then thought sufficient, as all attornies were supposed to be personally present during the sitting of the court; but many of the attornies having been struck off the roll on forejudgers for want of other notice, and many living at a distance, so that it was impossible to give orders for an appearance in time before the expiration of the rules to appear, the above rule became necessary. Bar. 41.

Reason of the
above rule.

If the defendant appears in time, which is done by entering appearance with prothonotary, you deliver a declaration and proceed as in other cases according to the practice of this court, and which has been already shewn in the former volume; only let all the writs, as *venire*, *habeas corpus*, &c. be made returnable on a day certain in term, not on general return

How if defend-
ant appears.

However doubtful the practice might formerly have been, *Camelford v. Price*, Doug. 312.; *Lane v. Wheat*, Ibid. 313.; it is now settled that attorneys may be sued in vacation, as well as other defendants. *Wayborne v. Fields*, 5 D. & E. 173.

And the bill may be filed as of the term preceding. But if the cause of action really accrues in the vacation, in order that the bill may not appear to have been filed previous to the cause of action, and so occasion an incongruity upon the record, the bill should in such case be filed with a special memorandum, thus—

“Michaelmas term, &c. Be it remembered, that on the 14th day of December 1792, (a day after the cause of action accrued,) *A. Dodsworth* brought into the office of the clerk of the declarations of this court, according to the course and practice of the court, his certain bill against *W. Bowen*, gentleman, one, &c. and filed the same bill as of *Michaelmas* term, in the 33d year of the reign, &c., which said bill follows in these words,” &c. 5 T. R. 327.

But *quæ*. Whether this practice is permitted in the Common Pleas, or whether the bill must not be filed in term time in that court? *1 Imp. Cl. B. 569.*

OBSERVATIONS.

(A) On the Privilege of Attornies, &c.

(B) On the Privilege of other Officers of Courts, &c.

(A) Of the Privilege of Attornies, &c.

(A)

The privilege of an attorney is not so much a personal privilege, as the privilege of the court to which he belongs, and is instituted for the sake of the suitor, that the attorney in the cause shall not be drawn away from the court which it is his duty to attend. He therefore is not to be arrested, being supposed to be always present in court, and amenable to their judgment. He is to be sued by bill, (the only proper proceeding against officers of the court,) and is entitled to sue by attachment (the court's own peculiar process). He may also lay the *venue* in Middlesex, let the cause of action arise where it may, that he may not be drawn from the courts at Westminster, where his attendance may be required;

Attorney may be sued in vacation in K. B.;

and bill filed as of preceding term.

With special memorandum if cause of action accrued in vacation.

Quæ. as to C. B.

The nature of the privilege of attornies.

required; for this privilege as to the *venue*, see vol. I. ch. 6. sec. 7. (D).

Extends to actions under 40s.

Such is the general privilege of attorneys when plaintiffs or defendants, let the cause of action be what it may, *Camerford v. Price*, Doug. 313.; and though the amount of the debt be under 40s., for they are not subject to the jurisdiction of the county court, *Wiltshire v. Lloyd*, Doug. 381.; *Gardner v. Jessop*, 2 Wil. 42.; or the defendant be a member of the university and privileged to be sued there. *Jolliff v. Lampton*, *Ld. Ray*. 342.

Or where defendant is a member of university.

But an attorney is not compelled to sue as an attorney: he may sue by common process, and indorse his own name on the copy as the attorney; and he may afterwards, if he pleases, declare by another attorney, and notice of declaration may be in his own name. *Jackson v. Barnard*, 7 D. & E. 35.

When privilege is taken away.

In many cases this privilege is taken away, as when the reason for which it is granted fails.

If he be not a practising attorney.

Thus, if he be not a practising attorney; and he must have practised, unless hindered by illness, within a year; the name continuing on the roll is nothing. *Mayor of Norwich v. Berry*, Bur. 2109. R. Mich. 1054.

On an affidavit to be discharged upon filing common bail, on the ground of being an attorney, it should state that he had practised within a year previous to the arrest. *2u*. Whether it ought not to state that he had also taken out a certificate? *Dyson v. Bird*, 1 P. & B. 4.

So he is not entitled to privilege if he was formerly a practising attorney, but afterwards discontinued, and did not take out certificate for some years, during which time writ issued against him, although in fact after the *teste* of the writ, and before the actual arrest, he resumed his practice, and took out a certificate. *Brook v. Bryant*, 7 D. & E. 25.

If defendant, at the king's suit.

Nor if he be defendant at the king's suit. 2 Rol. Abr. 274.

Otherwise in a *qui tam* action.

But *qui tam* actions are not considered the king's causes. *Britton v. Teasdale*, Bar. 48.

Or if plaintiff would be deprived of his remedy in the attorney's court.

Or if the plaintiff cannot have his remedy in the court where he is attorney, as in actions real against an attorney of K. B. *Saund*. 67.

Or in appeal against an attorney of C. B. *Ibid*.

Or on a foreign attachment in sheriff's court in London. *Ibid*. Comb. 427.

If plaintiff or defendant in *auter droit*.

So, where he sues or is sued in *auter droit* as executor, *Ld. Ray*. 533. 2 Salk. 4.; or administrator, 12 Mod. 316.

Or

Or when he joins or is joined in any action with another, If he sues or is
Vent. 298. Dyer, 277.; for all or none must have privilege; sued jointly.
as if he sues with his wife in right of his wife, Ld.
Ray. 1398.; or the action be against him and his wife.

So, if he be actually in the custody of the marshal, he If actually in
shall only be sued in K. B. Str. 191.; and cannot plead his custody.
privilege, 2 Roll. Abr. 232.; for there is a great difference
between an actual and supposed custody. Salk. 1.

If an attorney of one court sue an attorney of another, Of privilege
he may proceed by attachment of privilege in his own court, where both par-
nor can defendant plead his privilege; for in such case where ties are attor-
there is privilege of one court against privilege of another, nies.
the court which is first possessed of the cause, shall retain the
jurisdiction of it. *Danfer v. Berryman*, Blac. 1325. *Skorter*
v. Parkhurst, Black. 19.

But if plaintiff and defendant are both attorneys of the
same court, defendant must be sued by bill, and plaintiff
cannot take out an attachment and hold defendant to bail,
as in the case of a common person.

This, therefore, is an exception out of the general rule,
that privilege takes away privilege. *Ratcliff v. Besley*,
Str. 1141. *Saunders v. Cockay*, Bar. 44.

As an attorney may waive his privilege when plaintiff by Attorney may
suing as a common person, so he may, when defendant, by waive his pri-
not claiming it in a proper time, or in a proper manner. vilege, as de-
2 Blac. 1088. fendant.

If an attorney, executor, or administrator is sued by bill Or the irregu-
of privilege, he cannot object after appearance, for the fault larity if sued as
is cured by appearance. Bar. 167. *Sed qu.* if shewn for attorney, when
cause of demurrer? he ought not to
be.

Defendant, an attorney of C. B., was sued in B. R. by What shall be
bill of privilege; plaintiff supposing him an attorney of that deemed a
court, judgment went by default, and plaintiff stayed two waiver.
terms in hopes of receiving his debt, and then gave notice
of executing a writ of inquiry; whereupon defendant moved
to set aside the proceedings as irregular. But the court on
shewing cause discharged the rule, and held, that by laying
by so long, he had waived his privilege. *Hern v. Howard*,
3 Blac. Rep. 231.

One attorney of C. B. sued another attorney of C. B. by
capias, and the defendant moved to stay the proceedings, in-
sisting he ought to be sued by bill. It appeared that the de-
fendant had obtained a judge's order for time to put in bail;
but this was held not to be a sufficient waiver of his ob-
jection to the plaintiff's method of proceeding against him.

and the rule was made absolute to stay proceedings with costs. Bar. 53.

An attorney having been arrested was bailed, and another action being brought against him in the same court, he pleaded his privilege, and it was adjudged that putting in bail to the first action did not discharge his privilege. Carth. 377.

How in declarations by the
bye against an
attorney.

An attorney of C. B. was arrested at the suit of an attorney of B. R. and gave bail, and then B. delivered a declaration by the bye against him as in custody of the marshal, to which he pleaded his privilege, and resolved that though he be in custody of the marshal at the suit of A., yet when A. declares against him he may plead his privilege, because he comes here by coercion, and had no opportunity before to take advantage of it. 2d. That although he files bail at the suit of A. and in the same term a declaration is delivered against him at the suit of B., yet the defendant may plead his privilege against B. as well as against A.; for it were absurd that B., who tops his suit upon the action of A., should have more liberty or advantage against the defendant than A. himself had. But if the defendant waives his privilege in the first action, he is then obnoxious to the suits of every body, notwithstanding his privilege. 3d. That if after the defendant has waived his privilege, he shall yet plead it; the plaintiff in his replication must shew the defendant's waiver, and rely upon the estoppel. *Ld. Ray. 135. Will. Rep. B. R. 306. Salk. 1.*

When an attorney can be discharged on motion, and when not.

If an attorney of the same court in which he is sued, be arrested, he may be discharged on motion; but if he be attorney of another court, he must find bail, and sue out his writ of privilege, and plead it in abatement, *Mayor of Basingstoke v. Bonner, Str. 864. Snee v. Humphreys, 1 Wil. 306;* for by the mere production of the writ of privilege to the sheriff, having arrested defendant, an attorney of K. B. on process out of C. B. is not entitled to his discharge, but must plead the writ *sub pede sigilli. Crosley v. Shaw, Blac. 1085. Forster v. Cole, Str. 76.*

Now the court will in such case stay the proceedings on motion, but without costs; otherwise the party would be in a better situation than if he pleaded his privilege in abatement; for in that case he would not be entitled to costs. *Barber v. Palmer, 6 D. & E. 524.*

If the arrest was on process, out of an inferior court, the writ should be allowed *instante*, and an order made for his discharge. *Crosley v. Shaw, Blac. 1085.*

How

(A) Sec. II.] BY AND AGAINST ATTORNIES.

How to sue out Writ of Privilege.

Engross writ on 2s. 6d. stamp; get a certificate from master's clerk in B. R. or clerk of warrants in C. B., that defendant is an attorney of the court; which certificate is an authority for signer of writs in B. R. or prothonotary in C. B. to sign same; pay nothing for signing; sealing 7d.; carry it to the clerk of papers of inferior court, the judge will allow it, and order defendant's discharge.

Of the writ of privilege.

The Form of the Writ of Privilege is as follows :

George the Third, &c. To the judges of our court of our palace at Westminster, and to every of them, greeting : Whereas, according to the custom of our court (of the bench or before us) at Westminster, hitherto used and approved of in the same, the attorneys of the court (of the bench or before us), whilst they are prosecuting or defending suits and actions therein, for their clients, ought not, nor have they from time immemorial, been used to be compelled to answer before any of our justices or officers, or any other secular judges whatsoever, upon any pleas, complaints, or demands, which do not particularly belong to us, (pleas of freehold, felonies, and appeals excepted,) save only before (our said justices of our said court of the bench; or thus, before us by bill exhibited, in our said court before us, and not by writ) : and whereas we have lately received information by the complaint of A. B. gentleman, one of the attorneys of our said court (of the bench or before us), that several ill-disposed persons, intending to disquiet the said B., have issued forth and prosecuted out of our court of our palace at Westminster, one or more writ or writs returnable, before you in the same court; or one or more precept or precepts returnable in our said court, before you or one of you, against the said B., and threaten to arrest and detain him in your custody thereupon, in suits which do not relate to us (or in pleas of freehold, felonies, or appeals excepted); whereby the said A. B. is unable to attend his said office as an attorney upon several affairs and suits depending in our said court (of the bench or before us): which, if it is permitted, will manifestly take away, and be not only in derogation and diminution of the jurisdiction of our said court (of the bench or before us), and the liberties and privileges thereof, but also to the great detriment of the said B. and his clients: and because we are willing that the jurisdictions, privileges, and customs, for so long time used and approved in our said court (of the bench or before us), should be inviolably kept and observed: We command you and every of you, that you desist from

Form thereof;

To show that
regarding

Referred to

How advantage
to be taken of
an erroneous
writ of privi-
lege.

taking the said A. B. into your custody, upon any writ or writs, precept or precepts; and if the said A. B. be detained in your custody, by any writ or writs, precept or precepts, other than such as particularly concern us (pleas of freehold, felony, and appeals, only excepted), that then you discharge the said A. B. out of your custody, and suffer him to go at large, as you will answer the contrary at your peril; and that you inform the party or parties, plaintiff or plaintiffs in the plaint or plaints, that he, she, or they may prosecute his, her, or their action or actions, suit or suits (in our court of the bench or before us) by bill, to be exhibited (to our justices of the said bench, or to us in our said court before us) at Westminster, against the said A. B. if he, she, or they shall think it expedient so to do. Witness, &c.

No advantage can be taken of an erroneous writ of privilege (on error brought) upon the bare recital in the record; but the writ itself ought to be before the court by *certiorari*.
Ld. Ray. 1398.

(B)

(B) Of the Privilege of other Officers of the Courts, &c.

Of the privilege
of other officers
of the court.

All the officers in the Court of King's Bench, as well as the attornies, have the privilege of suing by attachment, and being sued by bill, in actions by and against them in their own right, and where they are not joined with others, except in pleas of land, of which the court of Common Pleas alone has jurisdiction.

Of the officers
of C. B.

But the officers of the Common Pleas, amongst whom are the serjeants, prothonotaries, secondaries, clerks of the prothonotaries, serjeants clerks, clerks of the judges, &c. have not the privilege of being sued there by bill as attornies have, but only the privilege of being sued there in every suit (except appeals) by original writ, because they are supposed not to be always present in person in court as attornies are. *Baker v. Swindon*, Ld. Raym. 399. 3 Salk. 283. Bar. 286. Holt, 589. Adj. P. 6 W. & M. C. B. Windford. Rot. 685. *Baker v. Duncalf*, 3 Lev. 398. *Windmill v. Cutting*, Str. 191.

Of serjeants.

But it was agreed in *Serjeant Scroggs's case*, that the privilege of C. B., which serjeants claimed, extended only to inferior courts, and not to the courts of Westminster-Hall, and that he may be sued in either of these, because he is not confined to that court alone, but may practice in any other court. 3 Salk. 280. 1 Mod. 298.

But

But it is otherwise as to attornies or filazers, who cannot practise in their own name in any other court, but such as they respectively belong to; and that therefore a serjeant at law is to be sued by original, and not by bill of privilege, 2 Lev. 129. 3 Keb. 424. 4 Mod. 226. So of the servant of a serjeant at law. Cro. Car. 84.

Defendant pleaded his privilege as a serjeant with a writ annexed: but for want of an affidavit that he had business in C. B. and there only, the court set it aside. *Stiles v. Mead*, Str. 738.

The judges have privilege of being sued in their own court. 3 Leon. 149. Of judges.

But if the Chief Justice of the King's Bench or Common Pleas, bring an action there, the *placita* must be before the other three judges, omitting the chief; Ld. Ray. 778.; otherwise it would be erroneous, 8 Hen. 6. 81. Salk. 398.

Per Holt—Privilege is either of court or of process; persons belonging to the court as attornies, &c. have the privilege of court; that is, of being sued there and not elsewhere. But none shall be allowed the privilege of process, but those who are officers of the court, and are supposed to be always there. 3 Salk. 283.

To an action in the King's Bench, defendant pleaded that he was one of the six clerks in Chancery, and ought to be sued there. Replication that he never attended and acted as such; the fact on trial was, that he did all the business by deputy. *Per Lord Kenyon*: though it is to be lamented that these clerks do not personally attend, yet such absence is not sufficient to deprive him of his privilege. *Spencer v. Shepherd*, Sittings in Trinity Term 1795. Of the six clerks in Chancery.

Privilege not lost by executing office by deputy.

SECTION III.

Of Proceedings against Prisoners.

So watchful is the legislature over the liberty of the subject, that although on the one hand from an anxiousness to assist the industrious creditor in the recovery of his just demand, the person of the debtor, as we have already shewn, is made liable to imprisonment where the debt is above 10*l.*, provided sufficient bail cannot be found; yet, from a fear of his confinement being unnecessarily prolonged, the plaintiff is compelled to proceed against such prisoner with all due expedition, and is confined by certain regulations and restrictions, which, if not adhered to, the defendant is entitled instantly to his discharge.

Proceedings against prisoners governed by particular regulations.

Attornies answerable to their clients for not observing them.

In proceedings against prisoners, therefore, the utmost caution and circumspection should be exercised, more especially since, if the defendant be discharged by any omission or neglect of the plaintiff's attorney, though perhaps only from an error in judgment, he will be rendered liable to make satisfaction to his client. *Russel v. Palmer*, 2 Will. 325.

The defendant when a prisoner on *mesne* process must be in custody either of the sheriff in some county gaol, or of the marshal of the King's Bench, or warden of the Fleet, and this must be at the suit either of the plaintiff himself, or some other person; in order therefore to render these proceedings (which are apt to perplex the young practitioner) plain and intelligible, we will consider each of these cases in their order.

(A) Of declaring against Prisoners.

1st. *When in Custody of the Sheriff (not of the Marshal or Warden) at the suit of Plaintiff.*

2d. *When in Custody of the Sheriff at the Suit of another Person, and Plaintiff wishes to declare against him.*

3d. *When in Custody of the Marshal or Warden at the Suit of Plaintiff.*

4th. *When in Custody of the Marshal or Warden under a prior Commitment at the Suit of another Person or at Suit of same Plaintiff, but for another Cause of Action.*

5th. *Of declaring by Original.*

6th. *Of the Time of declaring.*

(B) Of the Plea, and when Prisoner must plead, &c. or Plaintiff be entitled to Judgment.

(C) Of the subsequent Proceedings of Plaintiff to Trial and Execution.

(D) How to charge Prisoner in Execution.

1st. *If in Custody of Sheriff.*

2d. *If in Custody of Marshal or Warden.*

(E) Of the Superfedeas; when Prisoner entitled to it, and how obtained.

(F) Of Proceedings by and against Prisoners, having removed themselves after being charged with Process.

(A) Of

(A) Of declaring against Prisoners.

(A)

The mode of declaring depends upon the following circumstances:

1st. In whose custody defendant is; whether in the custody of the sheriff, or of the marshal or warden.

2dly. At whose suit defendant is in custody; whether at the suit of plaintiff himself, or under a prior commitment at the suit of another person.

1st. Of declaring against Defendant in Custody of the Sheriff at the Suit of Plaintiff.

When defendant cannot find bail upon being arrested at plaintiff's suit, he must go to the county gaol; and if he be not removed by *habeas corpus* into the prison of the court, (*i. e.* Marshalsea or Fleet,) plaintiff may declare against him in the custody of the sheriff.

Of proceeding against prisoner in custody of sheriff.

By 4 & 5 W. & M. c. 21. it is enacted, "That where any defendant or defendants be taken or charged in custody at the suit of any person or persons, upon any writ or writs out of any of the said courts at Westminster, and imprisoned or detained in prison for want of sureties for their appearance to the same, the plaintiff or plaintiffs in such writ or writs shall and may, by virtue of the said act, before the end of the next term after such writ or process shall be returnable, declare against such prisoner or prisoners in the respective court or courts out of which the writ or writs shall issue, whereupon the said prisoner or prisoners shall be taken and imprisoned or charged in custody, and shall and may cause a true copy thereof to be delivered to such prisoner or prisoners, or to the gaoler or keeper of the prison or gaol, in whose custody such prisoner shall be or remain; to which declaration or declarations the said prisoner or prisoners shall appear and plead; and if such prisoner shall not appear and plead to the same, the plaintiff or plaintiffs in such cases shall have judgment in such manner as if the prisoner or prisoners had appeared in the said respective courts, and refused to answer or plead to such declaration."

Of the stat. 4 & 5 W. & M.

Plaintiff may declare against prisoner in custody of the sheriff.

When.

To which declaration prisoner must plead.

And by sect. 3. it is further enacted, "That in all declarations against any prisoner or prisoners, detained in prison by virtue of any writ or process issued out of the court of King's Bench, it shall be alleged in custody of what sheriff, bailiff, or steward of any franchise, or other person having the return and execution of writs, such prisoner or prisoners shall be at the time of such declaration

The declaration in K. B. must state in whose custody such prisoner is.

"by virtue of the process of the said court at the suit of the plaintiffs; which allegation shall be as good and effectual to all intents and purposes, as if such prisoner or prisoners were in the custody of the marshal of the Marshalsea of our Sovereign Lord," &c.

How the practice was before this statute.

Before the making of this statute, the plaintiff in every action, in order to declare against the defendant, a prisoner, was obliged to bring him into court by writ of *habeas corpus*, which being attended with great expence and much inconvenience gave rise to the act,

How to declare.

In B. R.

If suit be by bill, file copy of declaration engrossed on treble 1d. stamp parchment with clerk of declarations; make three other copies thereof on treble 1d. stamp paper, deliver one to gaoler or turnkey, or to the prisoner himself; annex another copy to an affidavit of such delivery or service, which must be made and sworn before a judge in town or commissioner in country; and annex a third copy of declaration to an office copy of such affidavit; carry them to clerk of rules, who will keep the original affidavit and declaration thereto annexed, to file, and will examine your office copy of affidavit, and mark thereon the day of filing affidavit, and also the rule to appear and plead. R. East. 5 W. & M.

N. B. In this court where the process is by bill, declaration must state in whose custody defendant is, and also that he is so in custody at the suit of plaintiff. *Ld. Ray.* 1362.

How declaration must be delivered.

When in C. B. declaration must be entered with prothonotary.

In C. B.

Make only two copies of declaration on treble 1d. stamp paper; take them to prothonotary to get them entered; pay for entries thereof; deliver one to turnkey, asking him at same time if defendant is a prisoner at suit of plaintiff; or to prisoner, and annex the other to an affidavit of such delivery, which must be made, sworn, and filed with the declaration annexed with the secondary; upon which, but not till then, he will give a rule for defendant to appear and plead. R. East. 5 W. & M.

There is no occasion as in B. R. to state in declaration that defendant is in custody of sheriff or at whose suit, that section of the statute being confined to B. R.

Upon the above statute it is to be observed, that the declaration must be delivered personally to the prisoner or gaoler, of which the rule requires an affidavit containing the time when, and person to whom it was delivered.

It has been held in C. B. that a declaration against a prisoner in a county gaol need not be entered with the prothonotaries before the delivery, but before it is filed with the secondary it must; which means any time before rule to plead

plead given. *Strickland v. Hodgson*, Cooke's Rep. 114. Barnes, 372. S. C.

If a defendant is in the custody of the sheriff, and the plaintiff has declared against him as in such custody, he may, notwithstanding, if he thinks proper, remove the defendant into the custody of the marshal by *habeas corpus ad faciendum et recipiendum*; for the act 4 & 5 W. & M. was only made for the ease and benefit of plaintiffs, to save them the trouble and expence of suing out an *habeas corpus* to bring the defendant into court, and does not take away the plaintiff's common law right to remove him. *Dr. Bettesworth and Bell*, Esq., 4 Burr. Rep. 1875.

But such *habeas corpus* must be tested in term, though it may be returnable immediately.

2d. Of declaring against Defendant in Custody of Sheriff at the Suit of another Person, or at Suit of same Plaintiff, but for another Cause of Action.

Where defendant is already in custody of any sheriff at the suit of another person, plaintiff may either remove him by *habeas corpus* into the prison of the court, (*vide post*, tit. *Habeas corpus*), or he may charge him with the action in the custody of the sheriff.

How to charge Defendant (already in Custody of the Sheriff) with a fresh Action.

If your action be not bailable, serve defendant with copy of process; and if he do not appear thereto accordingly, file common bail, or enter an appearance for him, according to statute, and proceed in the usual way.

If in custody at the suit of another person.

But if your action be bailable, make affidavit of cause of action, and sue out writ as in other cases, which must be left at sheriff's office for sheriff to charge such defendant in custody therewith; pay 2s. 4d. Then file your bill, deliver declaration, and make copies thereof, as *ante*, p. 88.

But should the same plaintiff have several causes of action, or should other plaintiffs institute suits against such prisoner, whether it be by detainer of the person, or for a cause not requiring special bail, the proceedings in such suits must be commenced by the like process as if the defendant were at large, and not by delivering a declaration in the first instance, as is the proper way of proceeding against a prisoner in custody of the marshal, who being always in court, requires no process to bring him thither. *Robertson v. Douglas*, 1 T. R. 191.

If in custody at suit of same plaintiff, but for another cause of action.

The

How declaration to be delivered.

The declaration need not be delivered to a prisoner personally, or to the gaoler, unless where he is in custody at the suit of the same plaintiff, for the same cause of action. *Robertson v. Douglas, Ibid. 191.*

3d. *Of declaring against Defendant in Custody of Marshal or Warden at Suit of Plaintiff.*

B. R.

Of proceeding against prisoner in custody of marshal or warden.

If defendant be in K. B. prison in custody of marshal, file bill as before on treble 1d. stamp parchment with clerk of declarations, make only one copy thereof, which deliver to turnkey, or to prisoner. No affidavit of such delivery on service need be made, but give a rule to plead, &c. as in other actions.

C. B.

If defendant be in the Fleet, make two copies of declarations on treble 1d. stamp paper; carry them to prothonotary's, who will mark and enter them; then deliver one to turnkey, asking him if defendant is his prisoner at plaintiff's suit; or to prisoner, and annex the other to affidavit of such delivery, and file it with secondary, who will give a rule thereon for defendant to appear and plead.

When the prisoner is in the Fleet, the declaration must be entered with the prothonotaries, before it be delivered to the defendant. *Cooke's Rep. 114.*

4th. *Of declaring against Defendant in Custody of Marshal or Warden at Suit of another Person.*

If your action be not bailable, serve defendant with copy of process, and if he do not appear thereto accordingly, file common bail, or enter an appearance for him according to statute, and proceed in the usual way.

But if your action be bailable, and you wish to detain defendant in custody upon it, the following rule is to be observed :

B. R.

It is ordered, that from and after the last day of this term, no declaration, whereby any prisoner shall be charged in the custody of the marshal, shall be sufficient cause of detaining such prisoner in custody, unless an affidavit, that the plaintiff's cause of action against such prisoner does amount to 10l. or upwards, shall be first made and filed with the clerk of the rules of this court, and the sum specified in such affidavit shall be indorsed

C. B.

It is ordered, that no copy of a declaration delivered at the Fleet prison against any prisoner there, shall be sufficient charge to hold such prisoner to bail, or to retain such prisoner in custody for want of bail, unless an affidavit, that the plaintiff's cause of action amounts to 10l. or upwards, be first made and filed in the prothonotary's office, and an indorsement made by the said prothonotary or his deputy upon such copy of a declaration,

indorsed by him upon such declaration, before the leaving thereof with the turnkey. East. 15 Geo. 2.

File bill, make affidavit of debt, take copy of bill on treble 1 d. stamp, with affidavit to clerk of rules, who will indorse declaration according to above rule; serve it as abovementioned on turnkey or defendant, and proceed as before directed.

declaration, signifying the sum of money specified in such affidavit, for which sum so indorsed, bail shall be required, and no more. Hil. 8 Geo. 2.

Make two copies of declaration as before directed, and having got one marked by prothonotary according to rule, proceed as before.

The declaration indorsed by clerk of rules, or marked by prothonotary, must be delivered, and not a copy. *Newhall v. James*, P. R. 331. Burr. 1052.

What declaration must be delivered.

How if in vacation time.

B. R.

To charge a prisoner in custody of the marshal in vacation time (instead of the old method of suing out an habeas corpus ad respondendum tested as of the last term) the plaintiff must file a bill of the preceding term, and then deliver or leave for the defendant in custody a copy of the declaration as of the preceding term, and make an affidavit of the delivery thereof. Burr. 47. 1052.

C. B.

To charge a prisoner in the custody of the warden of the Fleet in vacation time, the plaintiff draws his declaration as of the preceding term, gets it stamped by the prothonotary, and delivers or leaves it with the clerk of the papers.

5th. Of declaring when Proceedings are by Original.

If defendant is in custody of any sheriff, &c. upon a special *capias*, then you declare against him by delivering a declaration only, on treble 1 d. stamp paper, thus:

Of proceedings by original.

Surry, to wit. Richard Fenn, late of, &c. yeoman, was attached to answer John Denn, in a plea of trespass on the case, and whereupon the said John Denn, by T. S. his attorney, complains, that whereas (as in other cases). You do not allege by original, in whose custody he is; but affidavit of the service is required, and you proceed the same as by bill afterwards.

If in custody of the marshal, declare against him in the same manner, and do not allege him to be in the custody of the marshal.

6th.

6th. *Of the Time for Declaring against Prisoners.*

B. R.

C. B.

Rule as to time
of declaring.

That no copy of a declaration be delivered to any prisoner in custody, before the day of the return of the process upon which the defendant was taken or charged in custody. East. 5 W. & M.

No copy of a declaration shall be delivered to any prisoner, until after the process upon which such prisoner shall be taken or charged in custody be returnable.

Of the last rule
26 Geo. 3.

It is ordered, " That from and after the last day of this term, in all cases where a prisoner is or shall be taken, detained, or charged in custody by *mesne* process hereafter returnable, issuing out of this court, and the plaintiff shall not cause a declaration against such prisoner to be delivered to such prisoner, or to the gaoler or turnkey of the gaol or prison where such prisoner is, or shall be detained or charged in custody, *before the end of the next term, after the return of the process, by virtue whereof such prisoner is or shall be taken, detained, or charged in custody; and (unless the prisoner is or shall be in custody of the marshal) cause an affidavit to be made and filed with the clerk of the rules of this court, of the delivery of such declaration, and of the time when, and the person to whom the same was delivered, before the first day of the next term, after the delivery of such declaration, the prisoner shall be discharged out of custody by writ of *superfedeas*, to be granted by this court, or one of the judges thereof, upon filing common bail, unless, upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary: and in case of a commitment, or surrender to the marshal, in discharge of bail, after the return of the process, and before a declaration delivered, unless the plaintiff shall cause a declaration to be delivered as aforesaid, before the end of the term next after such commitment or surrender shall be made, and due notice of such surrender given, the prisoner shall be discharged out of custody by writ of *superfedeas*, to be granted as aforesaid upon filing common bail; unless, upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary." Hil. Term, 26 Geo. 3. 1786.*

Explanation of
above rule.

By this rule (which comprehends the several stages of a suit on the part of the plaintiff) a prisoner becomes *superfedeable* in the following cases, unless good cause be shewn to the contrary, viz.

1st. If the plaintiff do not declare before the end of the term next after the return of the process, whereupon the prisoner may have been arrested.

As to time of declaring.

So that the time is not reckoned from the arrest, but the process: thus if writ is sued out in Trinity term, and on same day defendant is arrested, and the writ is not made returnable till Michaelmas term, which it may be though there might be plenty of time to make it returnable in Trinity, yet plaintiff has all Hilary term to declare in, being the next after the return of the process. *Richardson v. Richardson*, 6 D. & E. 547.

2dly. Although the plaintiff declare in due time, yet if he do not make, and file with the clerk of the rules, an affidavit of the delivery of his declaration, containing the time when, and persons to whom the same was delivered, before the first day of the next term after the delivery thereof, the prisoner becomes superseable; but it being unnecessary to make such affidavit if the defendant be in custody of the marshal, that case is excepted in the rule.

As to filing affidavit with clerk of rules;

3dly. In case of surrender or commitment of a defendant to the custody of the marshal, after the return of the process, and before declaration, unless the plaintiff declare before the end of the next term after such commitment or surrender, and due notice thereof given, the defendant becomes superseable.

and when not necessary.

As to declaring after a surrender, &c.

If a prisoner on *mesne* process escape, and is retaken on an escape warrant, and in custody of the sheriff, &c. the plaintiff must declare against him within two terms after taken on escape warrant. Reg. 6 Ann. B. R. and the same practice in C. B. 1 Barnes, 285.

Or after an escape.

If a prisoner escapes, his recaption shall be looked on as the time of the render from whence the plaintiff is to proceed. Barnes, 382.

If plaintiff does not declare in time, the defendant is entitled to his *superseas*.

Otherwise, defendant entitled to superseas.

But if the delay was occasioned from any treaty of compromise between plaintiff and defendant, which afterwards broke off, defendant shall not be discharged; for it is for the prisoner's benefit that plaintiff listens to proposals of accommodation. 3 Will. 455.

Exceptions as to above rule. In case of a treaty of compromise;

But now by same rule, 26 Geo. 3. it is ordered, "That no treaty or agreement shall be sufficient cause to prevent any defendant having the benefit of a *superseas* for want of prosecution, unless the same be in writing, signed by the defendant or his attorney, or some person duly authorized by the defendant; and it be therein expressed, that proceedings are stayed at the defendant's request."

which must now be in writing.

Of the rule for time to declare.

Seldom granted in proceedings against a prisoner; except in cases of outlawry;

in which plaintiff must proceed with due diligence.

Observations as to the delivery of declaration.

To whom to be delivered.

Gaoler must acquaint his prisoner therewith.

Generally speaking, the court will not grant plaintiff a rule for time to declare against a prisoner.

But where in a writ against three, one was arrested and lay in gaol, and the other two absconded, the court refused to discharge the prisoner, saying, that he must appear for all, or lie in gaol till the other two are outlawed; but in such case plaintiff must move for time to declare against him in custody. East. 12 Geo. 3.

So, where in an action against two, and one defendant was committed to the Fleet, and charged with the action for want of bail, and the other absconded, so that the plaintiff was not able to bring him into court by arrest, and therefore took out process of outlawry against him, which unavoidably over-run the time for declaring, viz. the two terms; the court thought it reasonable, as the plaintiff could not declare against the other, he neither being outlawed, nor in court, to allow a further time to declare. Barnes, 401. But in such case the court will expect plaintiff to shew, that he has used all diligence to outlaw the other. Barnes, 396.

7th. *General Observations on the Declaration, and what Person in custody may be charged therewith.*

A declaration must be served on a prisoner, or left with the turnkey, though he has appeared by attorney. 2 Black. Rep. 786.

And if a defendant is served with process, or arrested when at large, and becomes a prisoner in the Fleet before declaration, the declaration must be delivered to the turnkey. Barnes, 392.

As the delivery of a declaration against a prisoner to the gaoler is good, so is the delivery and service of every other proceeding and notice in the cause. *Whitehead v. Barber*, 1 Str. 248.

Where the defendant is in custody, the declaration must be delivered to the turnkey, and not into the office. 4 & 5 W. & M. c. 21. *Greenhouse v. Cleever*, 1 Str. 474.

B. R.

If any gaoler or keeper of a prison having received a copy of a declaration against any prisoner in his custody, shall suppress the same, and not deliver it forthwith unto such prisoner, an attachment shall be issued against him. East. 5 W. & M.

C. B.

If any gaoler or keeper of any prison having received a copy of a declaration against any prisoner in his custody, shall suppress the same, or not deliver it forthwith unto such prisoner, an attachment shall be entered against him.

After

After an irregular declaration against a prisoner, the plaintiff cannot declare *de novo*, unless the prisoner is in custody at another person's suit. *Prac. Reg.* 328.

How if declaration be irregular;

Nor can he, if he has mistaken his form of action, or the capacity in which he ought to have sued, make a new affidavit and so declare against him. *Bar.* 391. 397.

or plaintiff has mistaken his form of action.

Process may be served on a man in custody of the marshal, having surrendered himself to take the benefit of the act for relief of insolvent debtors. *Pry v. Lawford*, 3 *Geo.* 2.

What persons in custody are deemed chargeable with declaration as a prisoner. Insolvent debtor.

A prisoner, committed for a contempt, cannot be charged with a declaration without leave of the court. *Prac. Reg.* 325.

A person committed for contempt.

A prisoner surrendering as a fugitive cannot be charged with declaration under this act, because not committed, *Prac. Reg.* 126. 1 *Bar.* 281.; but it seems he may be arrested, *Ibid.* and *vide* 2 *Black. Rep.* 970.; that a fugitive surrendering himself to the Fleet under the insolvent act, is not a prisoner in the custody of the warden, nor liable to be charged with a declaration.

A fugitive who has surrendered.

One in custody on an attachment, cannot be charged in execution without leave. *Prac. Reg.* 825. But it has been since held, that a person in custody, under an attachment for non-payment of costs, may be charged. *Bonafous v. Schoole*, 4 *D. & E.* 316.

One in custody on an attachment;

A prisoner in custody on a criminal account cannot be charged with a civil action, without leave of the court. *Salk.* 354.

or on a criminal account;

A person attainted even of high treason may be charged with a civil action by leave of the court. *Ramsden and another v. Macdonald*, 1 *Wil.* 217.

or attainted of high treason;

The court will not give leave to charge a prisoner with an action who has a pardon upon condition of transportation, because it would defeat the effect of the pardon, and render the prisoner incapable of performing the condition on which he was pardoned. *Ld. Raym.* 848.

or a prisoner pardoned on condition of transportation;

But a prisoner on a charge of felony may be charged with a *latitat.* *Daintree v. Justice*, *Hil.* 9 *Geo.* 3.

or a felon.

If the defendant is in custody of any gaoler, &c. for felony, upon producing your affidavit (sworn before a judge) of the debt, the judge's clerk will give you an order to detain him; in this case affidavit is filed with Messrs. Provost and Webb, and sue out writ (or if bill of Middlesex, with Mr. Braithwaite) as in other cases; take the writ to the sheriff, and leave the order; pay 2s. 4d.

How to proceed in action against a felon.

A cre-

How if a person be voluntarily resident within the walls of the Fleet.

A creditor may lawfully enter a detainer against his debtor, who is resident within the Fleet, though he be not there by compulsion; for if he were in fact within the walls of the prison at the time, that is sufficient, for then he could not be arrested in the ordinary manner, but could only be detained. *Wilkinson v. Jaques*, 3 D. & E. 392.

(B)

(B) Of the Defendant's Appearing and Pleading.

B. R.

Before rule to plead given, affidavit of delivery of declaration must be filed, if defendant in custody of sheriff.

If the defendant is in custody of the sheriff, a rule to appear and plead must not be given before affidavit is filed of the delivery of the declaration, which affidavit must now be filed with the clerk of the rules before the first day of the next term after the delivery of the declaration. By Reg. Hil. 26 Geo. 3.

Not otherwise.

When declaration must be delivered to have a plea of that term.

But if the defendant is in the custody of the marshal, no affidavit of delivery is necessary, but a rule to plead may be given of course. And if the declaration is delivered four days exclusive before the end of term, and the rule given and plea demanded, (which must be done on the back of the declaration,) the defendant must plead as of that term. But if the bill is not filed, and copy delivered four days exclusive before the end of the term, the defendant may imparl till the next.

If process is returnable the first day of Easter or Michaelmas term, and the declaration be delivered before Mensen Pasche or the Morrow of All Souls, and affidavit thereof filed, the defendant must appear before ten days after Easter or Michaelmas term; and if he appears within that time, he may imparl till the next term, unless the action is in London or Middlesex, and defendant is in prison within 40 miles of London, and then though he appears within that

C. B.

The same practice in the Common Pleas, the affidavit being to be filed with the prothonotary. But if Easter term is the second term, then the affidavit of delivery must be filed within ten days.

But if defendant is a prisoner with the warden, no affidavit of delivery is necessary; and in such case the rule to plead is out in eight days inclusive.

If defendant is in a common gaol, and the declaration is delivered before the effoin-day of the term, the rule is out in four days.

In Easter and Michaelmas terms, if the declaration is delivered before Mensen Pasche, or Morrow of All Souls, the rules to plead are out in ten days after the term, except the action is in London or Middlesex, and the defendant a prisoner within forty miles, as in B. R.

that time he must plead two days before the effoin day of that subsequent term. Reg. East. 5 W. & M.

If the declaration be delivered on or after menssem Paschæ or Morrow of All Souls, or in Hilary or Trinity, and rules given, if defendant appears two days before the effoin day of the next term, he shall imparl till the next term; but if he does not appear within that time, the plaintiff is entitled to judgment.

And in Hilary and Trinity terms if the declaration is delivered on or after the effoin day of the term, the rules to plead are out two days before the effoin day of the subsequent term. But if defendant appears within the time he may imparl, as in B. R. East. 5 W. & M. and vide 1 Barn. 150.

If the declaration is delivered before the effoin day of the term next after the return of the writ, the plaintiff in such next term may give rules, and the defendant must appear and plead on or before the expiration of the rules. East. 5 W. & M.

In case of a prisoner in the Marshalsea, demand of plea is necessary, but not so if defendant is in custody of the sheriff. *Rose v. Christfield*, 1 D. & E. 591.

When demand of plea necessary.

Nor is any demand of plea necessary where the plaintiff sues defendant in the custody of the sheriff, and the defendant without notice to the plaintiff procures himself to be removed to a different custody. *Wilkinson v. Brown*, 6 D. & E. 524.

A prisoner may, any time pending the action, and before final judgment, file special bail, and justify same, and have a *superfedeas*, if in the custody of the sheriff; if in custody of the marshal, by a judge's order only.

Prisoners may in any state of the action put in bail and get discharged.

N. B. A justification in vacation before a judge, is sufficient upon notice.

If a defendant in custody file his plea with the clerk of the papers, or enter it in the general issue book before any plea be due; for example, if the declaration be delivered so late in term that the plaintiff is not entitled to a plea until the following term, and yet the defendant voluntarily pleads in the same term, he must give notice thereof to the plaintiff's attorney, otherwise such plea will be a nullity. *Thomas v. Prichard*, 4 D. & E. 664.

When prisoners must give notice of plea.

But in general a prisoner need not give notice of his having filed a plea; and what was said by the court in the above case, can only apply to cases where the defendant pleads out of time. In that case the defendant had a right to

impart until the next term: but he chose to file a plea in the same term, of which he gave no notice to the plaintiff. And if a defendant mean to avail himself of a plea which is filed before the time, when by the rules of the court he is compellable to plead, he must give notice of his plea. But in this case the defendant pleaded in the regular time, and therefore no notice of it to the plaintiff was necessary. *Rusbold v. Chapman*, 5 D. & E. 474.

If the defendant does not plead (no demand is necessary) within the time, sign judgment, and give notice of inquiry to the prisoner or turnkey, and proceed against him as in other cases (excepting that he must be proceeded against to final judgment, within three terms). See *post*, the rules East. 8 Geo. 1. and 26 Geo. 3.

But if you forget to sign your judgment on the first rule given to plead, you may in the next term give a fresh rule (no demand is necessary,) and for want thereof sign judgment when the rule expires.

(C) (C) Of Proceeding against Prisoner to Trial and Execution.

Within what time plaintiff must proceed after declaration to trial and judgment.

In all cases after declaration delivered, unless the plaintiff proceed to trial on final judgment, within three terms after such declaration delivered, (if by the course of the court the plaintiff have it in his power so to proceed, and of which three terms the term wherein the declaration is delivered shall be accounted one,) the defendant becomes superse-
deable.

How on a surrender after declaration.

In case of surrender in discharge of bail, after declaration delivered, unless the plaintiff proceed to trial or final judgment within three terms next after such surrender, and due notice thereof, (if, by the course of the court, the plaintiff have it in his power so to proceed, of which three terms the term wherein the defendant surrendered shall be accounted one,) the defendant becomes superse-
deable.

Within what time to proceed to execution, after trial in general cases.

In all cases after trial had or final judgment obtained against any prisoner, unless the plaintiff cause such prisoner to be charged in execution within two terms next after such trial or judgment, (of which two terms the term wherein such trial shall be had, or final judgment obtained, shall be accounted one, in case no writ of error be brought, or injunction obtained; and in such case within the like space of time next after the judgment be affirmed, the writ of error *non-prossed* or discontinued, or the injunction dissolved, in-

How in cases of writ of error or injunction.

cluding

cluding the term of such affirmance, *non pros*, discontinuance, or dissolution,) the prisoner becomes superseable.

In case of a surrender in discharge of bail after trial had, or final judgment obtained, unless the plaintiff cause the defendant to be charged in execution within two terms next after such surrender, and due notice thereof, (of which two terms the term wherein such surrender shall be made shall be taken to be one, if no writ of error be depending, or injunction be obtained; and in such case within the like space of time next after the judgment be affirmed, the writ of error *non-prossed* or discontinued, or the injunction dissolved, including the term of such affirmance, *non pros*, discontinuance, or dissolution,) the prisoner becomes superseable. R. 26 Geo. 3. B. R. 8 Geo. 1. C. B.

In case of surrender.

For the better understanding of this rule, it may be proper to state the proceedings. If the declaration is delivered in Hilary term 1791, the plaintiff must sign final judgment the last day of Trinity term, and charge defendant in execution the last day of Michaelmas term (unless error or injunction).

Construction of rule as to the time of charging in execution generally.

In country causes, and also in such as are tried at the sittings after term in London and Middlesex, the two terms allowed a plaintiff for charging the prisoner in execution after trial, must be computed from the term wherein the *distringas juratorum* is returnable, inclusively to the end of the following term, after which the defendant will become superseable immediately after the following Trinity term; or if at the Summer assizes, immediately after the following Hilary term, if not previously charged in execution; but should a plaintiff proceed to trial at the sitting within term in London or Middlesex, the defendant must be charged in execution in the following term, or he will become superseable.

Though the words of the rule, Hil. 26 Geo. 3. were general, applying as well to a surrender after verdict as after judgment, a distinction had obtained in practice between those two cases. When the defendant surrenders in the vacation after *final judgment*, the term in which judgment is signed is reckoned as one of the terms in which plaintiff must charge him in execution; but where the defendant surrendered in the vacation after verdict, the preceding term is not reckoned as one of the two terms. So it is in the Common Pleas. *Smith v. Jefferys*, 6 D. & E. 776.

As to charging in execution on surrender after verdict or final judgment.

Although it become impossible for the plaintiff to proceed to trial within the time directed by the rule, yet the defendant is not superseable until three terms have fully elapsed. *Thomas v. Prichard*, 4 D. & E. 664.

Notice of trial to a turnkey good, in an action against a prisoner. Str. 248.

(D)

(D) How to charge in Execution.

If in Custody of Sheriff.

Having entered, docketed, and filed your judgment of record, sue out a *ca. sa.* as in other cases, and get warrant thereon, which lodge with the gaoler in whose custody defendant is.

If in Custody of Marshal or Warden.

B. R.

Get rule of clerk of rules for marshal to acknowledge defendant to be in his custody; serve same on marshal, who will make out such acknowledgment; apply to clerk of treasury for him to enter up final judgment on the roll; pay 2 s.; make out committitur on slip of parchment unstamped; take it to the clerk of judgments, and file it with him, who will enter it on the roll; it is usual also to enter it in marshal's book at clerk of judgments. Defendant then stands charged in execution.

C. B.

Make out habeas corpus ad satisfaciendum on a 5 s. stamp, get it signed by prothonotary, pay 1 s. 4 d.; sealing 7 d.; procure judge's fiat thereon (4 s.), take it to clerk of papers at the Fleet, four days before return thereof, pay 9 s. 2 d.; apply to clerk of treasury to enter final judgment on roll, pay 2 s.; pay officer for bringing up defendant 10 s. 6 d.; crier 1 s.; secondary 10 s.

Qu. If entry in marshal's book necessary?

There is a book kept in the K. B. office, called the marshal's book, in which are entered the names of persons charged in custody previously to their being so charged. But this is a book of no authority, and only meant for the marshal's convenience, that he may readily see what persons are charged in custody; so that it is (in truth) only a memorial of the defendant's being charged in custody of the marshal, and not the cause or foundation of such charge and detainer. *Hutchins v. Kendrick*, 2 Burr. 1049. This has been adhered to in a late case before Lord Kenyon, and he held it not necessary on the Master's certificate, and refused to discharge the prisoner for want of such entry.

Of entering committitur on record.

The committitur must be actually entered on record before the end of the second term. 2 Str. 1215. *Unwin v. Kerchoffe*, 4 Burr. 1841.

Of necessity of acknowledgment.

Defendant discharged out of the custody of the marshal, because there was no acknowledgment by him of the defend-

ant's

ant's being in custody in the term in which he was charged in execution. *Fisher v. Stanhope*, 1 T. R. 464.

The plaintiff must give notice of his having abandoned a former *committitur* which is erroneous, before he enters a second, rectifying the mistake. *Topping v. Ryan*, 1 T. R. 227.

The plaintiff shall have every day in the second term to charge a prisoner. 2 Wil. 380. C. B.

The defendant a prisoner, applied to be discharged by *superfedeas* for want of being charged in execution within two terms after judgment. The plaintiff excused himself by the delivery of a *ca. sa.* to the gaoler, within due time. But the court held that to be insufficient. The *ca. sa.* ought to have been delivered to the sheriff, and the sheriff's warrant to the gaoler. Bar. 389. C. B.

If defendant, a prisoner, brings a writ of error, plaintiff has no need to charge him in execution the second term after the judgment. 2 Wil. 380. C. B.

If the plaintiff recover a judgment against two defendants in the King's Bench, and one of them bring error in the Exchequer-chamber, the plaintiff cannot charge the other defendant in execution till the record be remitted into the court of K. B., notwithstanding the writ of error might have been quashed immediately, because not brought by both the defendants. *Laroche v. Wasbrough and another*, 2 T. R. 737.

In such case where the judgment was affirmed in the Exchequer-chamber, and costs given of the writ of error, and both defendants were taken under writ of execution on the whole sum, including the costs of the writ of error, as well as the original sum recovered, this court permitted the plaintiff to amend his *committitur* in execution as to the defendant, who did not join in the writ of error, by altering it to the original sum recovered. *Ibid.*

(E) Of the *Superfedeas*.

(E)

If plaintiff do not declare and file affidavit of service of declaration, and proceed to trial, judgment, and execution, in manner and within the times limited by the rules of court as above respectively prescribed, defendant may obtain his discharge by *superfedeas*.

Of the notice of abandoning a committitur.

The whole of second term allowed to charge prisoner.

What shall be deemed a sufficient excuse for not charging prisoner in execution in time.

How if judgment against two, and one brings error.

How to obtain *Superfedeas*.

1st. *For want of Declaration.*

If Defendant in Custody of Sheriff.

B. R.

Get certificate from gaoler of the causes he is charged with, and affidavit of gaoler's signing same; take out judge's summons to shew cause why writ of *superfedeas* should not issue for defendant's discharge; serve same on plaintiff's attorney; one summons only is necessary; if he neglect attending, make affidavit of such service and attendance on your part, (which attendance is one hour,) and judge will make an order for *superfedeas* on defendant's filing common bail; take *superfedeas* to sheriff, who will discharge prisoner. Whole expence about 2s. 9d.

Serve copy of judge's order on plaintiff's attorney.

If by original, and defendant in custody of sheriff, get the order as above, file an appearance with the filazer, and he will make out *superfedeas*; get it signed and sealed.

If in custody of marshal, he will certify to him as by bill.

C. B.

Get certificate from gaoler of the causes prisoner stands charged with, and some person's affidavit who saw gaoler sign same; take out summons to shew cause why defendant should not be discharged for want of declaration; serve same on plaintiff's attorney, three summonses are necessary. If in attendance on either, make affidavit of services, and of your own attendance.

The attendance on the summons is but half an hour, but it must be exact.

Get judge's fiat, carry it to filazer who signed original writ, to be filed. Take *superfedeas* prepared and engrossed with you, and filazer will sign same, but you must first enter appearance with him as in a common case.

Serve copy of judge's order on plaintiff's attorney.

If Defendant in Custody of Marshal or Warden.

B. R.

If in custody of marshal, go to clerk of papers in K. B. prison for a certificate of causes with which he is charged; take out summons, and on plaintiff's attorney not attending, judge will make order: or common bail being filed, and upon certificate thereof from clerk of common bails, marshal will discharge defendant without any *superfedeas*.

C. B.

If in custody of warden apply to clerk of papers in Fleet for the causes defendant is charged with, then proceed by summons as before to obtain *superfedeas*, which is always necessary in this court for defendant's discharge.

Formerly in obtaining the *superfedeas*, it was necessary to get certificate from the clerk of the declarations if in B. R., or from prothonotary in C. B., that no bill or declaration were filed in that office against defendant; but that seems now unnecessary. 1 Str. 474.

Certificate from clerk of declarations unnecessary.

In all the above cases when common bail filed, or appearance entered, file memorandum of warrant according to 25 Geo. 3. c. 80.

2d. For want of Proceeding to Trial, Judgment, or Execution.

The manner of procuring defendant's discharge for want of plaintiff's proceeding to trial, &c. is very nearly similar to the mode above mentioned, according as prisoner may be in custody of sheriff, or of marshal, or warden, only the summons must be drawn agreeable to the fact, and three summonses in case of non-attendance will be always necessary. Also in C. B. *superfedeas* must be signed by prothonotary, instead of filazer.

If a plaintiff do not proceed to trial or judgment within three terms against the defendant (a prisoner), the latter is not entitled to be discharged, until the expiration of the third term. *Thomas v. Prichard*, 4 D. & E. 664.

Not entitled to discharge till expiration of third term.

OBSERVATIONS.

On the *Superfedeas*—when Prisoners entitled to it—its Effect, &c.

By the rules above-mentioned of 26 Geo. 3. in B. R. and 8 Geo. 1. in C. B., the particular times of proceeding are pointed out, and if plaintiff does not strictly adhere thereto, defendant will be entitled to his discharge by *superfedeas*, and the terms are always reckoned inclusive. *Davis v. Hale*, Bar. 279. *Huggins v. Bainbridge*, Bar. 383.

Plaintiff must proceed according to rules 26 Geo. 3. and 8 Geo. 1. or defendant will be discharged,

But this is upon the supposition that the plaintiff is capable of proceeding within the time specified, for if, by the act of the court or of the defendant himself, he should be prevented, no advantage by *superfedeas* is to be taken.

except in certain cases.

As if the court delay giving judgment on demurrer, or the like, or assize only held in the county once a-year. *Huggins v. Bainbridge*, Bar. 383.

As when prevented from proceeding by an act of the court; or writ of error;

Or defendant brings a writ of error, or files an injunction. *Garratt v. Menthill*, 2 Wil. 380.

Or pleads a plea, found bad on demurrer. *Bibbins v. Mantill*, 2 Wil. 378.

or bad plea;

But if he brings a writ and puts in bail, he may be discharged on *superfedeas*, Bar. 499, *Roe v. Whitehead*; for the bail will be liable.

or being obliged to outlaw a defendant;

So, if it be a joint action, and one defendant be a prisoner, and against the other plaintiff is obliged to proceed to outlawry, as he cannot declare till the latter be outlawed, he shall be excused for not proceeding against the former, but must take out rules from time to time, for time to declare, *Knight v. Parker* and another, Blac. 759.; and must also use all due diligence. *Tracy v. Garnston*, Bar. 396. *Linthwaite v. Bigbee*, Bar. 398. *Williams v. Mainwaring*, Bar. 401.

or by treaty of compromise;

So, if there be any treaty of compromise between plaintiff and defendant, this shall excuse. *Walter v. Stewart*, 3 Wil. 456.

But now by 26 Geo. 3. this compromise must be in writing.

or escape of defendant.

Or if defendant has escaped after render, for then the time of recaption shall be deemed the time of render. *Mabson v. Butler*, Bar. 382.

But not by delivery of ca. sa. to gaoler.

But it is not an excuse for not charging in execution, that *ca. sa.* was delivered to gaoler in due time; it ought to be delivered to sheriff, and sheriff's warrant to gaoler. *Poole v. Cooke*, Bar. 389.

If prisoner superseable, when he should take advantage of it.

When a prisoner is superseable, he should take advantage of it in due time; for although it is a rule that a prisoner once superseable is always so, yet that rule only holds so long as he remains in the same custody, and under the same process; for if a prisoner on *mesne* process be superseable for any irregularity, (as for not declaring or proceeding to trial or the like,) and does not take advantage of it before he is charged in execution, he cannot afterwards avail himself of it, being then in custody under a different process. *Rose v. Christfield*, 1 D. & E. 591. n.

Explanation of the rule once superseable, always so.

But plaintiff cannot charge him in execution after he has obtained the *superfedeas* though before he is discharged by virtue thereof, *Kirk v. Burrowes*, Bar. 375. *Webb v. Dorwell*, Bar. 400.; provided defendant has served the plaintiff's attorney with a copy of the judge's order for the *superfedeas*, otherwise he may. *Clayton v. Stapp*, Bar. 379.

Prisoner must complain of any irregularity in first instance.

For where a prisoner applies on a mere irregularity, he is in the same situation with any other defendant, and must come in time and do what he ought on his part. *Robertson v. Douglas*, 1 D. & E. 191.

Thus if a declaration be delivered against a prisoner as such, after he has obtained a *superfedeas*, it is irregular, but unless he apply to the court in due time, subsequent proceedings will not be set aside; the application should be made

made immediately. *Gelegan v. Harper*, 1 H.B. 251. *Hutchins v. Kenrick*, 2 Burr. 1048.

So, a prisoner superseable is only so with respect to the plaintiff himself; not to third persons, for by them, so long as he is in actual custody, he may be charged in execution. *Hutchins v. Kenrick*, 2 Burr. 1048.

And only to plaintiff himself in that cause in which he is so superseable; for he may be charged in execution in another action, for a different cause at the suit of A. *Grub v. Crick*, Bar. 500.

If a prisoner be superseable for want of declaration but not superseded, plaintiff cannot discontinue, and charge defendant with a new writ for the old cause. *Peck v. Adams*, Bar. 396.

Nor can he, after a *superseas*, hold him again to bail in another action for the same cause. *Meredith v. Barry*, Bar. 393.

So, after judgment reversed on writ of error, plaintiff cannot charge defendant with a second declaration. *Peachey v. Bowes*, Bar. 368. 499.

Nor after judgment recovered, can he charge him with declaration in an action of debt on such judgment, instead of charging him in execution. *Childs v. Prows*, Bar. 390.

But he may discontinue, and proceed on a common unballable action for the same cause. *Culme v. Dingle*, Bar. 392.

So if plaintiff has sued in a wrong capacity, or mistaken his action, if he has only one cause of action, he cannot make a new affidavit and charge defendant with a fresh declaration for the same cause, though in a different form; but if he has a different cause of action against him, he may charge him with it, though originally taken in custody upon the wrong cause. *Abdy v. Hopkins*. *Parsons v. White*, Bar. 391.

The defendant having been discharged by *superseas* before judgment, is not finally discharged, but after judgment is subject to be taken in execution. But where a defendant is superseded after judgment, for want of being charged in execution, his person cannot afterwards be taken in execution, Bar. 376. C.B. *Wright v. Kerfwill*. Nor can he be arrested on the judgment. *Hall v. Howes*, Cas. temp. Ld. Hard. 244.

A defendant who has been superseded for want of being charged in execution, cannot be held to special bail, in an action brought upon such former judgment; but after judgment obtained in such second action, he may be charged in execution. *Blandford v. Foote*, Cow. 72. *Wright v. Kerfwill*, Bar. 376. *Ismay v. Dewin*, 2 Blac. 982.

When superseable, to whom, and in what actions he is so.

Of plaintiff's discontinuing or charging defendant with new declaration.

How if he has mistaken his action, or has another cause of action.

When defendant can be taken in execution after *superseas*;

or held to bail in an action on the judgment.

A. super-

When super-
deas pleadable
to action on
judgment.

What shall be
satisfaction of
judgment.

A *superfedeas* obtained after judgment, cannot be pleaded in bar to an action on such judgment. *Tappin v. Ryan*, 1 D. & E. 273.

Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to satisfy the judgment, and that security is afterwards set aside on account of a mere informality, the judgment is satisfied, and cannot be set off against a demand of the prisoner. *Jaques v. Withy*, Ibid. 557.

And if defendant be discharged out of execution on terms not afterwards complied with, plaintiff cannot resort to the judgment again, and charge defendant's person in execution. *Vigers v. Aldrick*, Burr. 2482.

In all cases where the *superfedeas* is delivered to the sheriff, he is bound to discharge the defendant out of custody, or has nothing to do with any irregularity that may have taken place previous to the *superfedeas*. *Jones v. Lauder*, 6 D. & E. 754.

[F] (F) Of Proceeding by and against Prisoners having removed themselves, when charged with Process.

B. R.

If a prisoner in the *Marshalsea* on mesne process, removes himself to the Fleet before the plaintiff has declared against him, the plaintiff then must declare in C. B. and cannot proceed further in B. R., unless he brings the defendant back there by habeas corpus ad respondendum, but he has his election, and may do either. *Sherston v. Hughes*, 5 D. & E. 35.

But if a prisoner in the custody of the marshal, after being charged with a declaration in B. R. removes himself to the Fleet, the plaintiff must proceed to judgment in B. R., and then bring the defendant back by habeas corpus ad satisfaciendum, to be charged in execution in B. R.

And note, that if upon the defendant's removal from B. R. to C. B., before plaintiff has declared, the plaintiff does not declare within the two terms, (vide the

C. B.

If a prisoner in the Fleet removes himself to the *Marshalsea* before the plaintiff has declared, the plaintiff must declare in B. R. and cannot proceed further in C. B. unless he brings the defendant back by habeas corpus ad respondendum.

And if a prisoner in the Fleet charged with a declaration in C. B. removes himself afterwards to the *Marshalsea*, the plaintiff must proceed to judgment in C. B., and then carry him back by habeas corpus ad satisfaciendum, to charge him in the Fleet.

And note, that if upon defendant's removal from C. B. to B. R., before the plaintiff has declared, the plaintiff does not declare within the two terms, the defendant's appli-

(F) Sec. III.] AGAINST PRISONERS,

the rule Hil. 26 Geo. 3. ante,) the defendant's application for a superseas must be made to C. B.

But if he removes after being charged with a declaration, (and not brought back by habeas corpus,) then plaintiff must proceed to judgment in K. B., and may carry him back by habeas corpus to charge him in execution, and for want of being charged in execution in due time, &c. he must apply for a superseas to B. R.

application for a superseas must be to B. R.

But if he removes after being charged with a declaration, (and not brought back by habeas corpus,) plaintiff must proceed to judgment in C. B. and may then carry him back by habeas corpus, to charge him in execution, and for want of being charged in execution in due time, &c. he must apply for a superseas in C. B. Bar. 384, 385.

If two writs of *habeas corpus* issue, the one out of B. R. and the other out of C. B., where the person is in gaol, the writ which is first served shall have the body, and the prisoner may afterwards by another writ remove himself into the other court; but then he must plead first.

A prisoner surrendered by bail was superseded, because charged in the same court after he had removed himself. 2 Str. 1153.

Motion for a *superseas* for want of a declaration in C. B. within two terms. Defendant committed to the Fleet (charged *inter alia* with a bill of Middlesex at the plaintiff's suit) before declaration delivered, and afterwards the plaintiff delivered a declaration in the King's Bench at the Fleet, and not a declaration in C. B., which declaration, being delivered, after the defendant had removed to the Fleet, as a declaration of the King's Bench, the court held as null and void, and made the rule absolute. Bar. 402.

Plaintiff having made affidavit of his debt in B. R. arrested defendant by *latitat* indorsed for bail. Defendant removed himself to the Fleet by *habeas corpus*, charged with his *latitat*; and plaintiff declared against him there without making a second affidavit, on which defendant moved to be discharged on a common appearance, insisting, that in order to hold him to bail regularly, plaintiff ought to have made an affidavit of his debt in this court, and procured it to be indorsed on the declaration, according to the rule 8 Geo. 2. A rule was made to shew cause, which was discharged, the court being of opinion, that the rule of court extends only to cases where a declaration is the first proceeding, and not to this case. *Sampson v. Warren*, Bar. 75.

The king by his prerogative has a right to sue in what court he pleases, and to imprison his debtor in the gaol for the county or liberty where he is arrested; and another person

How if a writ of *habeas corpus* issues from each court.

After removal he must be charged in that court where removed.

If removed to Fleet, though process in K. B. declaration must be in C. B.

When this may be without fresh affidavit of debt in that court.

The king may sue or imprison his debtor where he pleases.

son cannot charge him and remove him by *habeas* to another prison. *Sandys v. Spivey*, Bar. 388.

Proceedings
must be in same
time notwith-
standing re-
moval.

In cases of superseding actions by reason of plaintiff's not proceeding against prisoner in time, the being turned over from one custody to another makes no difference, but is always considered as the continuation of the same custody. Burr. 439.

For further information hereon, see Ch. XVIII, sec. 3, title *Habeas Corpus*.

The King's Bench prison being the prison of the court is wholly subject to their controul as to its boundaries, regulations of the prisoners, and the like. The limits of its rules are at present prescribed by R. East. 35 Geo. 3. and by R. East. 30 Geo. 3. Every prisoner having a day-rule must return within the walls or rules before nine in the evening.

SECTION IV.

Of Proceedings against Bail upon their Recognizance.

Explanation of
the proceedings
against bail.

In the former volume of this work (Ch. III.), the doctrine of bail has been treated of and explained; and it may be remembered, that when the defendant, in compliance with the condition of the bail-bond given to the sheriff, appears to the action, bail above or special bail, as it is called, are put in, who enter into a recognizance to the plaintiff: whereby they undertake, that if the defendant be condemned in the action, he shall satisfy plaintiff the costs and condemnation, or shall render himself a prisoner, or that they will do it for him.

But this is only upon the supposition that the plaintiff should not be able to take the defendant in execution, and to get satisfaction from him either by his paying the debt, or by having his body in custody; for if the plaintiff, after he has recovered judgment, does not proceed against the person of the defendant, but on the contrary takes out execution against his goods or lands, by *feri facias* or *elegit*, he has made his election, and the bail are discharged.

Necessity of
suing out *ca. fa.*

Whenever therefore plaintiff intends to resort to the bail, his execution must be by *capias ad satisfaciendum* against the principal; which shews he would have the body till satisfaction is made; and this writ of *ca. fa.* must be returned by the sheriff, with a *non est inventus*, for the bail are of course liable only on failure of their principal. This writ amounts to a demand on defendant to pay or surrender himself a prisoner,

(a)
et, &c.

soner, which if not done by the return thereof, or if the bail do not surrender him within that time in discharge of themselves, it is presumed that they are ready to pay the debt or damages recovered.

If the bail refuse so to do, their recognizance is then forfeited, they are said to be fixed, and plaintiff may proceed against them either by *action* or *debt* upon the recognizance, or by writ of *scire facias*, "Whereby the sheriff is commanded to make known to them the judgment recovered, and the force and effect of their recognizance entered into, that the defendant has not surrendered himself to the prison of the marshal of the Marshalsea or Fleet (as the case is), and therefore they appear in court, and shew cause why the plaintiff should not have execution against them, for his debt and damages recovered."

Of the previous Steps of entering Recognizance, and suing out Ca. fa.

As the proceedings against the bail are founded upon the recognizance forfeited, it should regularly be a previous step, whether plaintiff proceed by *scire facias* or by action of debt, to get the recognizance of bail first entered on the roll which must be carried in and docketed.

Recognizance to be entered, and ca. fa. sued out, whether proceedings by action or sci. fa.

I say it should regularly be, because the forfeiture of the recognizance is the ground of proceeding; but yet, in point of practice, it is often not done until after the writ against the bail is sued out; and indeed, should the defendant plead *nul tiel record* of the recognizance, it is sufficient if the roll be carried in any time before the replication; but it is most safe and proper to get it done in the first instance.

In C. B. the filazer, upon being requested, will enter the recognizance and get it docketed.

How recognizance entered.

In B. R. the attorney does it.

Get roll of the term of which declaration is of, at Mr. Way's office; make a docket-paper thus:—"The entry (a) of Thomas Smith, gentleman, one, &c. of Michaelmas term 35th of George the Third."

Middlesex, ff. Recognizance of bail for C. D. at the suit of A. B. Roll. 273.

Enter on roll memorandum of term declaration is of; then copy declaration, and afterwards recognizance of bail. Carry roll to clerk of judgments, he will enter recognizance, and mark roll; pay 3s. for the docket, then carry it to the treasury-chamber and file it.

The form of the memorandum is the same as in making up the issue (Vol. 1. Ch. ix.), and after the declaration is

(a) If you have before carried in rolls of that term, say, the further entry of, &c.

gone

Form of entry
of recognizance.

gone through, then go on thus: " And the said C. D. by
" John Palmer his attorney, comes and defends the wrong
" and injury, when, &c and thereupon E. F. of Charing-
" cross in the county of Middlesex, mercer; and G. H. of
" Fleet-street in the city of London, grocer, (describing the
" bail as in the recognizance,) came into the court of our
" Lord the King, before the King himself, at Westminster,
" in their proper persons, and became pledges and manucap-
" tors, and each of them became pledge and manucap-
" tor for the said defendant, that if it should happen that
" the said defendant should be condemned in the plea afore-
" said, then the said manucaptors granted, and each of them
" did grant, that all such damages, costs, and charges, (if
" the action be in debt, and judgment be recovered on a
" verdict, say, did grant, that as well the said debt, as all
" such damages, costs, and charges; or if in debt, and
" judgment was by default, say, did grant, that as well
" the said debts, as all damages,) as should be adjudged to the
" said plaintiff in that behalf, should be made of their
" and each of their lands and chattels, and to be levied to
" the use of the said plaintiff, if it should happen that the
" defendant should not pay the said plaintiff, or render
" himself, on that occasion, to the prison of the marshal of
" the Marshalsea of our said Lord the King, before the King
" himself."

How *ca. sa.* sued
out.

Besides making an entry of the recognizance, a writ of
capias ad satisfaciendum against the principal must be also sued
out, and returned *non est inventus*.

Its teste and re-
turn.

If proceedings be by bill, eight days between teste and re-
turn of *ca. sa.* is sufficient; if by original, fifteen.

Care should be taken that the *ca. sa.* does not bear teste of
a term prior to that in which judgment is signed against the
principal; as all proceedings against the bail thereon will be
irregular. *Gawler v. Jolly*, 1 H. B. 74.

How left in
sheriff's office.

The *ca. sa.* is left in the sheriff's office, and must be left
there four days before the return; sheriff then returns it *non
est inventus*.

Intent thereof.

There is no attempt in point of fact to find the principal
on this *ca. sa.* but it is merely as a warning that plaintiff
means to proceed against the bail; or rather the *ca. sa.*
against the principal being left in the sheriff's office, is as no-
tice to the bail, that the plaintiff will proceed against the
person, and it is incumbent on the bail to search whether any
ca. sa. be left in the office. *Burr.* 1360.

Bail must search
for it.

The *ca. sa.* need not be filed immediately on the return,
but if defendant pleads no *ca. sa.* sued out, if it be filed any
time before replication, it is sufficient.

When to be
filed.

If the plaintiff has not sued out a *ca. sa.* against the principal, in order to ground his proceeding by *scire facias* against the bail, within a year after the judgment obtained, a *scire facias* should first go against the principal to revive the judgment, before a *scire facias* goes against the bail on their recognizance; but the bail cannot take advantage of this. Raym. 1096. 6 Mod. 304. Holt, 90.

If *ca. sa.* not sued out within the year, *sci. fa.* to revive judgment must first go.

How to proceed by Action on Recognizance.

Sue out process as in a common action, as *latitat* or *capias*; but defendant cannot be arrested. *Brander v. Robson*, 6 D. & E. 336.; the only difference is, that although the process be not bailable, yet an *ac etiam* must be inserted that the defendant may have notice for what he is sued, and that the writ ought to be served at least four days before the return, that defendants may have the usual time to render the principal; the *ac etiam* is as follows:

B. R.

And also to a bill of the said A. B. against the said C. D. and E. F. in a plea of debt upon recognizance, according to the custom of our court before us to be exhibited.

Lay the venue always in Middlesex.

C. B.

And also that the said C. D. and E. F. answer the said A. B. in a plea of debt upon recognizance, according to the custom of our court of Common Bench.

Lay the venue in Middlesex, or in the county where recognizance was taken.

See *post*, Observations (A).

All the subsequent proceedings are as in other cases.

How to proceed by Scire facias.

The recognizance being entered, and *ca. sa.* returned as above directed, prepare *scire facias*, (which is generally made out by the attorney,) engross it on 2s. 6d. stamp parchment, get it signed and sealed; it is then at your option either to cause the defendants to be actually summoned thereon or not.

If Defendant is to be summoned.

Carry *sci. fa.* to the sheriff's office, get a summons thereon, give it to your officer, who will summon each of the bail; the summons is good if left on the day of the return *sedente curia*; let *sci. fa.* lay in sheriff's office the last four days exclusive before the return-day, R. East. 592.; when it is returnable, call for the return, sheriff will return *scire feci*. Then in

B. R.

Give a rule for judgment on piece of plain paper.

A. v.

C. B.

Give rule at prothonotary's on the appearance-day of return of *sci.*

A. v. B. and C. bail of D. rule on sci. fa.

It is a four-day rule exclusive, enter it with clerk of rules, make an entry of *sci. fa.* or part thereof, showing the sum recovered on a roll, get it marked by clerk of judgments, and then sue out execution against the bail, which may be by *ca. sa.* or *fi. fa.* and either against both or only one of the bail; let *sci. fa.* be tested on return of *ca. sa.* if by bill; if original, as in *C. B.*

sci. fa. for defendants to appear; enter *sci. fa.* on roll to be had at prothonotary's, and at expiration of rule to appear; if no appearance entered, the clerk will sign judgment; file writ with *custos breviarum*, and sue out execution, which may be as in *B. R.*

Let *sci. fa.* be tested on the *quarto die post* of return of *ca. sa.*

Where only one *sci. fa.* it is sufficient if there be four days exclusive between teste and return.

See *post*, Observations (C).

If Defendant is not to be summoned.

Prepare *sci. fa.* carry it to sheriff's office, get it returned *nihil*, sue out an *alias* tested on the return-day of first *sci. fa.* in *B. R.* if proceedings by bill; but if by original, then as in *C. B.* and on *quarto die post* of such return-day in *C. B.*, let it lie in sheriff's office the last four days exclusive before the return, when returnable get it from sheriff returned *nihil*; let there be 15 days between the teste of the first *sci. fa.* and the return of the *alias*, and it will do whether proceedings be by bill or original. Having got second *sci. fa.* returned *nihil*, proceed to give rule for judgment in *B. R.* and for appearance in *C. B.*, as above-mentioned.

Let the returns of the writs be on a particular or general return, as the proceedings are by bill or original.

Where a *scire facias* against bail is not returned, the plaintiff cannot proceed upon an *alias sci. fa.*, without an entry of the first upon the roll. *Ld. Raym.* 822. 1252.

If the second *sci. fa.* be returnable of different terms in *B. R.*, enter the first on a roll of the term in which it is returnable, and make an award of the second, get it docketed and marked by the clerk of the judgments in the next term; on return of second *sci. fa.* clerk of treasury will, after expiration of rule for judgment, enter the award of the judgment on the same roll.

But in *C. B.* there must be two different rolls, the one of the term on which first *sci. fa.* is returnable, and whereon the first must be entered with an award of the second, and docketed as of that term; and on the other the second *sci. fa.*

How if *sci. fa.* be returnable in different terms in *K. B.*

In *C. B.*

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sci. fa. is to be entered with the judgment, on default of appearance.

See *post*, Observations.

Such are the proceedings, if the bail do not appear; if they do, the appearance is effected, and the subsequent proceedings are as follows:

Of the Appearance of Defendant, and the subsequent Proceedings.

If defendant appear on the *sci. fa.*, such appearance is effected in

B. R.

C. B.

By defendant's attorney giving plaintiff's attorney notice on a slip of paper, that he appears for defendant upon the *sci. fa.* By entering appearance on a slip of paper at prothonotary's.

Plaintiff then declares (declaration to be engrossed on treble 1 *d.* paper, charge 8 *d.* per folio), to which defendant pleads, &c. and the subsequent proceedings are carried on the usual way. A rule to plead, and demand of plea necessary as in other cases, and defendant entitled to an imparlance, if declaration not delivered four days exclusive before the end of the term.

N. B. Plaintiff's attorney, not the clerk of the papers, makes up issue on paper-book on proceedings by *sci. fa.* in *K. B.*

How to proceed by Original in *K. B.*

The *ca. fa.* must be returnable on a general return-day, *ubique*, &c. and must have fifteen days between the *teste* and return, stat. 13 Car. 2. c. 2. It is the filazer's duty to enter the recognizance, and docket the roll; therefore after the *ca. fa.* is returned, *non est inventus* against the principal, take it to him for the *sci. fa.*, who will make it out; pay 7s. 2 *d.* seal 7 *d.* leave at the sheriff's office; when it is returnable, apply to sheriff for it; if *nihil* is returned, then make out an *alias* yourself, which is a copy of the first, (excepting the *alias* part,) "therefore we command you as formerly we have commanded you" being added, sign it with Messrs. Provost and Webb, pay 1s. 8 *d.* seal 7 *d.*

N. B. The filazer does not make out the *alias* (and this agrees with the practice in the *C. P.* the prothonotary signs the *alias*, and not the filazer. Imp. *K. B.* 6 edit. 494.

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E

After

How to proceed by original.

Rule for judgment.

After the return of the second *sci. fa. nihil*, or of one *sci. feci*, give a rule on the *sci. fa.* as before on the *quarto die post* of the return-day at the clerk of the rules, which expires in four days after that day, then enter the same on the roll (if no appearance) and take it to the clerk of the judgments who enters same, pay 2s. the judgment by default as before.

But if there be a *nihil* returned on the first *sci. fa.* then no rule is given until the return-day of the *alias*.

Form of Entry of *Sci. fa.*'s and *Nibils*.

Entry of two *sci. fa.*'s and *nihil* thereon by bill.

Middlesex, *ss.* Our lord the king sent to his sheriff of Middlesex his writ closed in these words, to wit, George the, &c. (copy to the end of the first *sci. fa.*), at which day before our lord the king at Westminster came the said John Denn in his proper person, and the sheriff, to wit,

and the sheriff of the said county, returned

to us that the aforesaid A. B. and C. D. had not, or had either of them, any thing in his bailiwick where or by which he could give them or either of them notice as by the said writ he was commanded, nor were they or either of them found in the same: Therefore, as before it is commanded to the said sheriff, that by good, &c. he make known to the said A. B. and C. D. that they be before our lord the king

Award of the *alias*.

(a) The return of the *alias*.

at Westminster on (a) next after to shew in form aforesaid, if, &c. and further, &c. the same day is given to the said F. G. there, &c. At which day, before our said lord the king at Westminster, came the said F. G. in his own proper person, and the sheriff as before returned that the said A. B. and C. D. had not, or had either of them, any thing in their bailiwick whereby or by which he could give them or either of them notice, as by the said writ he was commanded, nor were they or either of them found in the same. And the said A. B. and C. D., although on that day solemnly required, came not, nor did either of them come, but made default; it is therefore considered, that the said F. G. have his execution against the said A. B. and C. D. of the damages aforesaid, according to the force, form, and effect of the recognizance aforesaid, by the default of the said A. B. and C. D. &c.

Default of bail.

Judgment on the *sci. fa.*

Form of Entry where there is a *Sci. fa.*

If only one *sci. fa.* returned *sci. feci*, how to enter it.

If there be only one *sci. fa.*, and it is returned *sci. feci*, stop at the end of the sheriff's return, and then say,

" And the said A. B. and C. D., although on that day solemnly required, did not, nor did either of them, come; " it

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" it is therefore considered that the said F. G. have executed Judgment.
 " tion against the said A. B. and C. D. of the damages debt, and
 " aforesaid, according to the force, form, and effect of the
 " said recognizance, by the default of the said A. B. and
 " C. D." &c.

Middlesex, *ff.* Our lord the king sent to his sheriff of declaration;
 his writ closed in these words; to wit, George the
 Third, (copy the first *sci. fa.* and the return, to *Mansfield* and
Way, and the award of the second as far as the sheriff's re-
 turn, the same day is given to the parties aforesaid,) &c.
 (Then go on thus:) And at which day before our lord the king
 at Westminster, came as well the said F. G. in his proper
 person, as the said A. B. and C. D. by J. H. their attorney;
 upon which the said F. G. prays that execution may be ad-
 judged to him of the damages aforesaid, according to the
 force, form, and effect of the said recognizances, &c.

See *post*, Observations (F).

OBSERVATIONS.

(A) Of the County in which Proceedings by
 Action or *Sci. fa.* must be.

(B) Of the *Teste* and Return of *Sci. fa.*

(C) Of leaving the *Sci. fa.* in Sheriff's Office, and
 the Summons thereon.

(D) Of the Bail being fixed, and how relieved by
 rendering the Principal.

(E) Of relieving them after Error brought on
 Judgment against the Principal.

(F) Of the Declaration and Pleadings on *Sci. fa.*

(G) Of the Judgment and Execution.

(H) Of Error in the Proceedings, and of amend-
 ing *Sci. fa.*

(A) Of the County in which Proceedings against
 Bail must be.

(A)

In the court of King's Bench, the course is always to en- Of the venue in
 ter recognizances as taken in court, though actually by a K. B.
 judge at his chambers, and in that court they are not taken

E 2

in

in a sum certain, as in the Common Pleas, neither are they records till entered.

Ja C. B.

But in the Common Pleas they are records immediately upon the first caption, and bind the lands before filed at Westminster, and when filed, they are records in court; for this reason a *scire facias*, or debt, lies upon them in C. B. either in Middlesex where filed, or in the county where taken; whereas in the King's Bench, a *scire facias*, or action of debt thereon, must be brought in Middlesex.

N. on rule 5 & 6 G. 2. Rules and Orders K. B. 251. 1 Cro. 312. Hob. 195. 2 Salk. 630. *Pickering v. Thomson*, Bar. 267. *Redman v. Idle*, Lutw. 1287.

Davy moved to set aside proceedings on a *scire facias* against bail, for irregularity; the *scire facias* being sued out in London, whereas the caption of the recognizance of bail was, (as he alleged) in Middlesex; for being taken before the Chief Justice generally, it shall be understood to be before him and his brethren at Westminster. And cited *Hall* and *Wickesfield*, Hob. 195. debt on recognizance, taken before the Chief Justice in Serjeants' Inn, Fleet-street, and *venue* laid in London. The question was, Whether the recognizance must be considered as entered into where it is taken, or at Westminster, where it is enrolled? The court held the declaration was right, because the enrolment expressed it to be taken in London. But if the entry of the record be general, that it was taken before the Chief Justice (without expressing where), it shall be understood to be taken in court; and the *venue* shall be in Middlesex.

Leigh shewed for cause, that where the bail is enrolled as taken in Middlesex, there the *sci. fa.* must be brought in Middlesex only; but where, as taken in any other county, the *sci. fa.* may be in either county; either in that in which it is taken, or in which it is enrolled; *Cooke*, 31.; 2 Barn. 74. 167.; with which agrees the case in *Hobart*. And this was allowed by the court, and by Davy for the defendant, to be the true rule. And on inspecting the record it appeared, that on the 28th of May 1770, the bail was enrolled, as taken the 11th of May preceding, before Sir J. E. Wilmot, at Serjeants' Inn, in Chancery-lane, London. *Kenny* against *Thornton*, 2 Blac. 768.

(A)

See also *Cock v. Greene*, *Cooke*, 31.

Difference between *sci. fa.* to revive, and *sci. fa.* against bail.

A *sci. fa.* to revive a judgment is the continuance of the suit, and must be brought in that county where the original action is laid. A *sci. fa.* against bail is the first proceeding.

(B) Of

(B) Of the *Teste* and Return of *Ca. fa.* and
Sci. fa.

(B)

If the action be by bill, there must be eight days between the *teste* and return of the *ca. fa.*, issued against the principal; *Ball v. The Bail of Russel*, 2 Raym. 1177; if by original, 15 days; and in both cases, the writ must lie in the sheriff's office four days exclusive before the return. 2 Salk. 599.

Of *teste* and re-
turn of *ca. fa.*

The *scire facias* ought not to bear *teste* before, but it may be tested upon the return-day of the *ca. fa.* *Stewart v. Smith*, 2 Str. 866. in K. B. on *quarto die post* of such return in C. B.

Of *sci. fa.*

The *alias scire facias* ought not to be sued out before the first be returned, and should be tested upon the return-day of the first. *Andrews v. Harper*, 8 Mod. Rep. 227. Anonymous, *Ibid.* 7. 40.

Of *alias sci. fa.*

If two *scire facias*'s issue, whereupon the sheriff return *nihil*, there must be fifteen days inclusive, between the *teste* of the first and return of the last; *per Holt*, Ch. J. 7 Mod. Rep. 40; 2 Jones, 221; 2 Salk. 599; 12 Mod. Rep. 215; but regard need not be had to the number of days between the *teste* and return of each. 2 Str. 1139.

Where there are
two *sci. fa.*'s

And this whether the suit be by bill or original.

The like practice in Common Pleas. *Peale v. Watson*, 2 Blac. 922.

If only one *scire facias* issue, whereupon the sheriff return *scire feci*, it is sufficient if there be four days exclusive between the *teste* and return. *Bell v. Jackson and another*, *Bail of Stirling*, 4 T. Rep. B. R. 663.

If only one *sci.*
fa.

A *scire facias* must not bear *teste* on a Sunday, for it is not *dies juridicus*. Dy. 168.

The *scire facias* must be returnable, as the original proceedings are, that is, at a day certain or a common return. *Ld. Raym.* 1417.

In C. B. the filazer makes out the first *sci. fa.* and the prothonotary the second. *Barnes*, 96.

So in K. B. when proceedings by original.

(C) Of leaving the *Scire facias* in Sheriff's Office,
and of the Summons thereon.

(C)

" Every writ of *scire facias* (of which notice shall be given
" to the defendant or defendants named in such writ) shall
" be delivered to or left in the office of the sheriff to whom
" directed, four days before the return of such writ, exclusive
" of the day on which such writ is returnable, and that

(C)

"every first writ of *scire facias* on which a *nihil* shall be returned shall be delivered to or left in the office of the sheriff some time before the return of such writ, and that every writ of *alias scire facias* shall be delivered to or left in the office of the sheriff *four days* exclusive before the return of such writ, and every sheriff shall write or indorse on every such writ the day of the month on which the same is so delivered to him or left in the office." R. East. 5 Geo. 2.

If only one *sci. fa.*
If two.

If only one *sci. fa.* issue, it must lie in the sheriff's office the last four days of the return; and if two, the first must lie there some time before the return, but the number of days is not material; and the *alias* the last four days of the return; and it is not sufficient that it have lain there four days, unless it be the last four days. *Forty v. Hermer*, 4 T. Rep. B. R. 583. *Miller v. Ferroway*, Burr. 1723.

How sheriff to indorse the *alias*.

Every sheriff must indorse on the *alias* the day of the month when delivered or left at the office. R. 5 G. 2.

How bail to be summoned.

When the bail is to be summoned, some notice must be given to them, the sufficiency of which, if disputed, must be determined by the court on the circumstances. In Middlesex it is usual to serve the bail with a copy of the sheriff's warrant, but not so in many counties where often a verbal notice is given. A personal summons and reading the sheriff's warrant to one of the bail, and leaving a memorandum containing the substance of the writ, with the wife of the other bail at his house, held good summons. *Wright v. Page*, 2 Blac. 837.

When.

The bail should be summoned so as to enable them to render the principal in due time.

Summoning them therefore one hour before the rising of the court on the return-day not good. *Webb v. Harvey and another*, 2 D. & E. 757.

A fortiori, if summoned after the rising of the court on the return-day. *Poole v. Wells*, Ibid. 758.

Court will take notice of the time.

Nor does the sheriff's return of *scire feci* estop the bail from shewing that they were summoned so late that they could not bring in the principal before the rising of the court; *Ibid.*; notwithstanding the case of *Barr v. Satchwell*, Str. 813; where the court said they would not enter into the truth of the return.

(D)

(D) Of the Bail being fixed, and how relieved by rendering Principal.

Condition of recognizance.

It has been before observed, that by the condition of the recognizance, the bail undertake that if the defendant does not

not pay the debt and costs, or render himself a prisoner, they, the bail, will do it for him.

If therefore, after judgment obtained, the debt and costs are not paid, and a *ca. sa.* issues against the defendant, and he neither renders himself, nor the bail render him before the return, but the sheriff returns *non est inventus*, the condition of the recognizance is broken, and the bail become fixed.

Consequence of
its being broken

Strictly speaking, the bail are fixed or responsible immediately upon the return of the *ca. sa.*; and although they are allowed to render their principal in discharge of themselves after that time, yet that is a mere indulgence *ex gratia curie*, and not *ex merito justitie*; so that if the principal should happen to die after the return of the *ca. sa.* and before such render be made, the bail are liable, and the court cannot relieve them. 2 Wil. 67. Cro. Car. 165. 1 Mod. 31. Ld. Raym. 1452. Str. 717. Bar. 106.

Bail fixed on
return of *ca. sa.*

Nor does it signify whether the *ca. sa.* be filed or not; if it be returned it is sufficient to fix the bail, and in case of the death of the principal afterwards, the court will not stay the filing in aid of the bail. *Rawlinson and another v. Gunston*, 6 D. & E. 285.

Though not
filed.

See also *Hunt v. Cox*, 1 Blac. 393.

Motion to stay proceedings against the bail, the *ca. sa.* was returnable the last return of Michaelmas, viz. 28th November, and the principal died 1st December; the *ca. sa.* being then in the sheriff's office, and not actually returned till the 3d December, and the motion was denied. *Boylard v. Crooke and others*, bail of *Porter*, B. R. 1748.

And even if re-
turnable and in
office, though
not returned.

But although in strictness of law the bail are fixed at the return of *ca. sa.*, so that no render after that time can be pleaded, yet out of indulgence to bail, the courts will on motion stay proceedings against them, provided they render their principal within the time hereinafter mentioned, now allowed for that purpose.

Within what
time court will
relieve bail after
they are fixed.

That is to say, if the plaintiff proceeds by action of debt upon the recognizance, the bail shall in K. B. (by rule Trinity term, 1 Ann.) have eight entire days in full term next after the return of the process to surrender their principal, and upon notice thereof given to the plaintiff or his attorney in such suit, all further proceedings against the bail shall cease.

If proceedings
by action
against them.

If an action be brought in K. B. on a recognizance taken in C. B., the bail have the same indulgence of eight days to render the principal as if the recognizance had been taken in K. B. *Fisher v. Branscombe*, 7 D. & E. 355.

In C. B. they must surrender the principal before or on the appearance-day of the return of the writ, *sedente curia*. *Derisley v. Deland*, Bar. 82.

And this, whether proceedings by original or attachment of privilege. *Fletcher v. Aingell*, 2 H. Blac. 117.

If writ returnable the 27th, a render on the 30th, *sedente curia*, is good. *Lardner v. Bassage*, 2 H. Blac. 594.

And the writ must be served four days before the return.

We see therefore that there is not much real difference in the two courts respecting the indulgence given to the bail, though nominally it is greater in K. B. than in C. B.; for though in the former they have eight full days in term after the return of the writ against them, and in the latter court they have only until the *quarto die post* of the return of that writ; yet such writ must in that court be served four days before it is returnable.

If by *sci. fa.*

But if the plaintiff sues by *sci. fa.* the bail then have in B. R. until the rising of the court upon the return-day of the second *scire facias*, to surrender the defendant, and discharge themselves. *Anonymous*, 8 Mod. Rep. 341. 1 Wil. 270.

But in C. B. (or in K. B. if proceedings be by original) the bail have till the *quarto die post* or appearance of the return of the first *sci. fa.*, if returned *scire feci*; if not, till the *quarto die post* of the return of the second *sci. fa.* 1 Wil. 270. 4 Bur. 2134. *Derisley v. Deland*, Bar. 82.

But in all the above cases, whether the surrender be on an action of debt or *scire facias*, it must be *sedente curia*, for a render after the rising of the court at a judge's chambers is too late. *Lardner v. Bassage*, 2 H. Blac. 594. *Simmonds v. Middleton*, 1 Wil. 270.

And when bail apply to the court for relief, having rendered the principal, the affidavit must state the render to have been *sedente curia*. Bar. 75. *Hansley v. Page*. And in *Ling v. Woodger*, Bar. 69, court ordered the hour and the true time of surrender to be entered by filazer, that it might appear whether it was made before the rising of the court.

The above seems now to be the settled time allowed for rendering, though the practice hath from time to time varied in this respect. Cro. Car. 618. 738. Moor, 850. 3 Bulst. 182.

An action was commenced against the bail, and afterwards the plaintiff was obliged to desist therein, and then the bail surrendered the principal before the new action brought, and moved to stay the proceedings; the court held the surrender to be good, it being before the return of the process in this suit, and it was the fault of the plaintiff not to begin right at first. *Hoare v. Mingay, one*, 1 Ec. Sra. 915.

So

Of surrendering principal after action against bail discontinued and before new one brought.

What the affidavit must state.

Court will order true time of render to be entered.

So where bail was served with process on his recognizance, who died before the *quarto die post*, till which time he had to surrender the principal, and fresh process was issued against his executors, it was determined that they had until the *quarto die post* of the second writ to surrender the principal. *Meddownscroft v. Sutton*, 1 P. & B. 61.

For it is sufficient if the principal is surrendered within four days after the return of that writ in which there is an effectual proceeding.

The manner in which the surrender must be made has been already shewn, Vol. I. Ch. iii. Sec. 6.

After a defendant is surrendered, notice thereof ought immediately to be given to the plaintiff's attorney, and the necessary steps for exonerating the bail-piece taken; for although an omission thereof shall not vitiate the surrender, yet, if any costs have been incurred by reason of such omission, the court will require the bail to pay the same before they discharge them, *Wells v. Osmond*, 6 Mod. Rep. 238.; or if defendant escape or be rescued, bail will be liable.

See also *Lyel v. Galletly*, 1 Salk. 101.

A motion was made to stay proceedings against one of the bail, who had been excepted to, and had not justified, but had omitted to get his name struck out of the bail piece. The court denied the motion in its present form, as in the case of *Fulk and Birk*, 4 Geo. 3., saying, that whilst the name remained upon record, proceedings could not regularly be stayed; but as in that case, they gave leave to enter an *exoneretur* on the bail-piece, *nunc pro tunc*, on payment of costs. *Humphrey v. Leite*, Bur. 2107.

The power that the bail have over their principal by way of taking him to make the surrender, has been already treated of, Vol. I. Ch. iii. Sec. 6.

And in a late case it has been determined that bail above may justify the breaking and entering the house of A. (the outer door being open) in which the principal resides, in order to seek for him, for the purpose of rendering him, and that such a justification is good, without averring that the principal was in the house at the time. And in such a plea an averment that the defendants "duly became bail, and entered into a recognizance," is sufficient, without stating that the principal was delivered to their custody. *Sheers v. Brooks and others*, 2 H. Blac. 120.

And if the defendant be in such a situation that it is impossible for the bail to render him, as a convict on board the hulks sentenced to transportation, court on motion will permit the bail to enter *exoneretur* on the bail-piece. *Wood v. Mitchell*, 6 D. & E. 247.

How surrender to be made.

Of the notice of surrender and of entering *exoneretur*.

When court will suffer it to be entered *nunc pro tunc*.

Of the power of bail over their principal to render him.

May break open his house in search.

How if it be impossible to render principal: as if he be a convict.

The

The bail in such case used to apply for a *habeas corpus* to bring him up to render him; but the above is the best way. 4 Burr. 1024. *Vergus bail*, Str. 1217.

See also other cases on the same principle, Vol. I. Ch. iii. Sec. 6.

How if he be
a soldier;
or impressed;

So a soldier may be surrendered by committing him to the marshal, and instantly setting him at large, or an impressed man under the keeper of the Savoy. *Bond and Isaac*, Burr. 339.

or a prisoner;

In general, where defendant is a prisoner, bail may have *habeas corpus* in term or vacation to bring him before a judge to render him. *Bettesworth v. Bell*, Burr. 1876.

or action be
against husband
and wife.

If the action be against husband and wife, and both be rendered, if not charged in execution, wife shall be discharged. Anon. 3 Wil. 124. Str. 1167. 1237.

How bail dis-
charged if prin-
cipal be a bank-
rupt.

If the principal becomes a bankrupt and obtains his certificate before bail are fixed, they shall be discharged on motion. But if they are fixed before the certificate obtained, they remain liable. *Woolley v. Cobb and others*, Burr. 244.

But not bail in
error.

But not so with bail in error; for they, not having the alternative of paying the debt or surrendering the principal, are not entitled to be discharged, although the defendant became bankrupt and be himself discharged of the debt. *Southgate v. Branthwaite*, 1 D. & E. 624.

Plaintiff cannot
resort to bail, if
he proves debt
under the com-
mission.

A creditor who obtains a verdict before commission against a bankrupt, is entitled to prove his costs as well as his debt, under the commission, though judgment was not signed till after the commission issue. But by proving his debt, and otherwise acting under the commission, he makes his election, and shall not afterwards resort to the bankrupt's bail. *Aylett v. Hartford and Richards*, bail of Lowe, Trin. 19 Geo. 3. C. B. 2 Blac. Rep. 1317.

Upon what
terms as to pay-
ment of debt
and costs, bail
may be dis-
charged.

If upon the return of *non est inventus* to the *ca. sa.* the plaintiff proceed against the bail and deliver a declaration conditionally, the bail cannot apply to the court to stay proceedings on payment of the debt and costs of the original action only, but must also pay the costs of the second action, though the bail tendered the original damages and costs before the end of eight days from the return of the *ca. sa.*, within which time, by the practice of the court, they might have discharged themselves by surrendering their principal, *Perigal v. Mellish*, 5 T. Rep. 363; because a right of action accrued to plaintiff immediately on return of *ca. sa.*

(E) Of relieving Bail after Error brought on principal Judgment,

(E)

The allowance of the writ of error is of itself a *superfedeas*.

The service of the allowance is only material to bring the party into contempt if he sues out execution afterwards. *Jagues v. Ninon*, 1 D. & E. 279. Burr. 340.

Writ of error should be delivered to clerk of errors to make it a complete *superfedeas*. K. B. R. 36 Car. 2. C. B. Bar. 205. *Meriton v. Stevens*. Ibid. 209. *Sykes v. Oakes*.

So if bail is required, it must be put in in due time.

If, therefore, writ of error be allowed before *ca. sa.* sued out, and afterwards plaintiff sues out a *ca. sa.* and proceeds against the bail, it will be irregular, and such proceedings will be set aside. *Dudley v. Stokes*, 2 Blac. 1182.

So if it be after judgment by default. *Ibid*.

And if *ca. sa.* be sued out but not returned, and in the interim notice of writ of error served, a return of *non est inventus* to the *ca. sa.* afterwards, pending the error, will be bad to ground any proceedings against the bail, though no such proceedings be had till writ of error spent. *Smith v. Nicolson*, Str. 1186. *Derisley v. Deland*, Bar. 83.

So that where a *ca. sa.* is returnable against the principal on a particular day, before which a writ of error is allowed and served; that operates as a *superfedeas* to any proceedings against the bail, though the *ca. sa.* has lain four days in the office before the allowance of the writ of error. *Perry v. Campbell*, 3 T. Rep. 390.

Whenever the writ of error is allowed after the return of *ca. sa.*, but before the time is expired within which the bail by the indulgence of the court may surrender the principal, though notice of the allowance may not be given to plaintiff's attorney till after the expiration of that time, the court will grant the bail the same terms as are usual when they apply within the time indulged to them for surrendering the principal; which terms are, "That the writs of *sci. fa.* issued against the bail should be stayed until the writ of error shall be determined, the bail undertaking to pay the plaintiff his damages recovered by the judgment, or surrender the defendant into the custody of the marshal of the Marshalsea of this court within four days next after the determination of the said writ of error, in case the same shall be determined in favour of the defendant in error."

Capron v. Archer, Burr. 340.

How writ of error is a *superfedeas*.

Of its operation if allowed before return of *ca. sa.* against principal.

Ca. sa. cannot afterwards be returned.

Though it has lain proper time before in the office.

Of the operation of writ of error if allowed after return of *ca. sa.*, but before the time expired when bail might otherwise have rendered.

Of the terms in such case on which bail will be relieved.

OF PROCEEDINGS AGAINST BAIL. [Ch. XIII (E)]

By determination of writ of error is meant the final determination.

The meaning of final determination of the suit as in the above terms.

Error was brought in *Cam. Scacc.* upon a judgment obtained against the defendant in B. R., and writs of *scire facias* had issued against the bail in the original action in B. R., where the bail obtained a rule to stay proceedings against them in B. R. upon the *sci. fa.* until the writ of error returnable in *Cam. Scacc.* should be determined, they undertaking to pay the debt and damages within four days after affirmance of the judgment, if the same should be affirmed. The judgment was affirmed in *Cam. Scacc.*, and afterwards the original defendant brought error returnable in parliament, to reverse the judgment given in *Cam. Scacc.*, on which the bail moved to stay proceedings against them till that writ of error was determined; and though it was objected that the bail were bound by the express terms in the former rule, the court made the rule absolute, holding that the word "affirmance" in the first rule must necessarily be understood to mean final affirmance. *Kirshaw v. Cartwright and Pearce, bail of Green*, Burr. 2819.

Of the operation of writ of error if not sued out till after time expired for bail to render.

But this is only when the writ of error is actually allowed before the time for rendering is expired, and the bail apply within that time; for if there be no writ of error until after the return of the second *sci. fa.*, though one be sued out afterwards, court will make no rule to stay proceedings. *Everitt v. Gery*, Str. 443.

Or if bail do not apply in time.

Or even if there be a writ of error in time, yet if the bail do not apply to stay the proceedings pending error, till their time to surrender is out, the court will not afterwards permit them to surrender, but will only stay execution and give them four days to pay the money in, after the judgment is affirmed. *Richardson v. Jelly*, Str. 1270. *Cole v. Buckland*, Ibid. 872.

Of the terms that in such case bail are let in upon.

And in case there be no bail required on the writ of error, court will also make them undertake to pay the costs on the writ of error, if judgment affirmed. *Ritson v. Francis*, Str. 877.

And if no bail in error, court will make them pay costs.

When proceedings will be stayed against bail, notwithstanding error.

If bail in error be required and not put in, it is not a *superseas*, and court will not stay proceedings against the bail. *Hunter v. Sampson and another*, Str. 781.

In like manner proceedings will be stayed, pending error, if plaintiff proceeds by action of debt on the recognizance, nor will the bail be required to give judgment. *Newman v. Butterworth*, Bar. 66. *Clarke v. Baker*, Bar. 68. But see *Gosfelow v. Wright*, Bar. 86.

(E) Sec. IV.] OF PROCEEDINGS AGAINST BAIL

If bail do not apply for relief, but suffer plaintiff to get judgment against them, though pending writ of error, court will not afterwards set it aside. *Fisher v. Emerson*, Str. 526. *Humphreys v. Daniel*, Bar. 202. *Clarkson v. Physick*, Bar. 203.

But not if bail by laches suffer judgment against them.

Though in a subsequent case, where plaintiff recovered judgment, and after error brought, proceeded against defendant in an action on that judgment, and got judgment by default in the second action, though court would not set aside the second judgment, they stayed proceedings thereon till writ of error determined; saying, it would be unreasonable that plaintiff should proceed in executing a judgment, which would of course fall to the ground in case the original judgment upon which it was founded should be reversed. *Taswell v. Stone*, Bur. 2454.

The bail in the original action upon a writ of error brought, where there is no bail in error, are not liable to the costs upon the affirmance of the judgment. *Penruddock v. Errington*, Cro. Eliz. 587. *Smith v. Faldo*, Cro. Jac. 636. *Tates v. Doughan*, 6 D. & E. 288.

Bail not liable to costs on affirmance of judgment.

In all cases, whether in K. B. or C. B., where it manifestly appears that the writ of error was brought for delay, plaintiff may proceed to execution against the principal or against the bail upon their recognizance, and such proceedings will not on motion be stayed or set aside. *Entris v. Shepherd*, 2 D. & E. 78.

How if error brought for delay.

But it should be by a confession of defendant or his attorney to that effect. *Pool v. Charnock*, 3 D. & E. 78, 79.

Same practice in C. B. But see Vol. I. Ch. xii. (I).

(F) Of the Declaration and Pleadings.

(F)

A declaration on a *scire facias*, returnable the last return of the term, may be intitled of the same term generally. 3 Will. 154.

How declaration intitled.

A man may plead in abatement or in bar to a *scire facias*, as well as other actions. Lucas, 112.

What may be pleaded to it.

There are but few pleas in bar which can be pleaded by bail to a *scire facias*.

They can plead that, no *ca. sa.* issued against the principal, or that he died before the return of the *ca. sa.*, or that the plaintiff had other execution; indeed if there be no *ca. sa.* sued out, returned and filed, it is no ground for a motion to quash the *scire facias* against the bail; but the bail must plead it, and be discharged by that means, and the replication to such plea must shew the time when *ca. sa.* issued, and that it was returned *non est inventus*, and not traverse the fact generally.

Of plea that no *ca. sa.* issued against principal.

Of the replication to such plea.

nerally. Carth. 4. And to a plea to *sci. fa.* against bail, that the principal died before the return of any *ca. sa.*, a replication, stating a particular *ca. sa.*, and that the principal was alive at the return of that *ca. sa.*, must conclude with an averment; for the *ca. sa.* in the replication is new matter; and by the rules of pleading, whenever new matter is introduced, the other party must have an opportunity of answering it. *Henderson v. Withy*, 2 T. Rep. 576.

How death of principal may be pleaded;

They cannot plead, that the principal died before the *scire facias* issued; Cro. Jac. 163., &c. because it might have been after *ca. sa.* returned.

or release;
or nul tiel record;

But they can plead, that the principal died before any judgment against him; because they cannot have a writ of error to reverse that judgment, or they may plead a release, or *nul tiel record*. But not that they rendered or principal rendered himself after the return of *ca. sa.*, as that is the only ground of relief upon motion.

or payment.

Bail pleaded to a *scire facias*, payment by the principal before the return of the second *scire facias*, and it was resolved the plea was bad; for in strictness of law, the recognizance was forfeited by suing out the first *sci. fa.* against the bail. *Ld. Raym.* 157.

But now by 4 & 5 Ann. c. 16. s. 12. payment of the sum recovered may be pleaded as well to a *sci. fa.* as to an action of debt.

But cannot plead, that one of the principals in a joint action was taken.

Sci. fa. against the defendant, as bail for A., B., C., and D., the defendant pleads that before the return of the second *sci. fa.* the plaintiff took A. in execution, and still detains him; demurrer *inde*. It was argued for the defendant, that the plaintiff having taken one of the principals in execution, had thereby disabled the bail to render him, and therefore discharged him as to all the rest; *sed per cur.* the bail have undertaken to bring in all four principals, and therefore though the plaintiff hath taken one, this does not discharge the bail as to the other three, for they ought, as they took upon them, to bring in all four. 2 Lev. 192.; 1 Vent. 315.

If *ca. sa.* against principal be void, bail cannot take advantage of it.

A *ca. sa.* made returnable at a day which falls out of term would not be void, (though liable to be set aside on motion,) nor can such a defect in it be taken advantage of by bail, upon a general demurrer to a *scire facias* brought against them. *Burr. Rep.* 1187.

How to proceed if necessary to have writ of inquiry on *sci. fa.*

If the plaintiff in a *scire facias*, either for want of the damages being previously ascertained, or upon obtaining judgment by default upon the *scire facias*, or judgment upon demurrer therein, is of necessity obliged to sue out a *sci. fi.* inquiry in order to ascertain his damages, he must give the like notice of executing the same, as must be given in other cases

cases of trial and executing writs of inquiry. For which, vide the first volume under these titles.

(G) Of Judgment and Execution.

(G)

When judgment is obtained against the bail, plaintiff may either bring an action of debt against them upon such judgment, and may hold them to bail thereon. *Bute v. Moore*, Trin. 28 Geo. 3. Imp. C. B. 548.

Of the remedy plaintiff has against bail upon judgment against them.

Or he may sue out execution by *ca. sa.* or *fi. fa.* *Elliot v. Smith*, Str. 1139. 3 Salk. 386. Imp. C. B. 548.

The *ca. sa.* should be a *testatum ca. sa.* in all cases; Imp. C. B. 556. in both courts.

In K. B. bail are only liable upon their recognizance to the amount of the debt sworn to, and costs. *Jackson v. Hapel*, Doug. 330.

To what extent bail are liable.

But in C. B. the practice seems different, and that bail are liable to the extent of the sum recovered against defendant and the costs, not exceeding their recognizance. *Calverac v. De Miranda*, Bar. 76.

And each of the bail are liable to the amount of their recognizance. *Ibid.*

Though the *scire facias* be joint, yet execution may be several, and taken out against one of the bail only.

If *sci. fa.* be joint, execution may be several.

But after execution of part against one bail, if the goods of the other be not sufficient to satisfy the residue, plaintiff cannot again resort to the first bail, because he might have levied the whole against him at once. *Fisher v. Carruthers*, Bar. 202.

When after part levied against one bail, he may again resort to him.

Although execution issue against the bail, if plaintiff be not satisfied from them, the plaintiff may still take the principal. 2 Cro. 320. 549. 1 Sid. 107.

Principal still liable if no satisfaction from bail.

(H) Of Error in the Judgment and amending

(H)

Sci. fa.

If bail bring error upon an award of execution in a *scire facias* against them, matter which lies properly in the mouth of the principal, or might have been pleaded to the *sci. fa.*, is not assignable for error, after execution awarded against them. *Wright v. Kitchingham*, Stra. 197. Salk. 262. 4 Mod. 306.

What assignable for error.

A *ca. sa.* may be void as to the principal, and yet well enough to ground a *scire facias* against the bail; as if *ca. sa.* be sued out a year after judgment, without reviving the judgment by *scire facias*; for the bail are strangers, and cannot take advantage of that error in a collateral action. 2 Ld. Raym. 1096. 6 Mod. 304. Holt, 90.

In

There should be
fresh warrant of
attorney.

In proceeding by *sci. fa.* there must be a fresh warrant of attorney to prosecute, the warrant in the original action is not a sufficient authority; a judgment on *sci. fa.* against bail was reversed for want of such fresh warrant. Salk. 603. *Atwood v. Burr.*

Sci. fa. not
amendable.

Care should be taken in proceedings on *sci. fa.* for a *scire facias* against bail is not amendable.

In a *scire facias* against bail, the plaintiff made a mistake in setting out the recognizance, which the defendant took advantage of, by pleading *nul tiel record*. And afterwards the plaintiff moved to amend it, but was denied; for *sci. fa.* against bail are never amended; and the course is for the plaintiff to quash his own writ, and proceed anew. This may be to defeat the bail of an opportunity to surrender, which he would have done, if he could not have been sure of proceeding in his plea. *Grey v. Jefferson*, Stra. 1165. *Bond v. Turner*, 8 Mod. 305.

But *2g.*

But in the Common Pleas, a *scire facias* against bail and all proceedings thereupon, were ordered to be amended by the record in the original action, by inserting the word merchant instead of mercer, being the defendant's addition, even after issue joined upon *nul tiel record*. *Smeetland v. Beezley and Brown*, Bar. 4.

But court will
quash it.

A *scire facias* ordered to be quashed on plaintiff's motion, without costs, before plea pleaded, although the defendant had entered an appearance. *Barnes*, 431.

SECTION V.

Of Proceedings by and against Infants.

To point out the various cases in which infants are rendered liable to an action, and the distinctions in law which renders their acts either binding or void, or only voidable, would exceed the limits and purposes of this work, which only professes to explain the mode of proceeding in an action brought by or against them.

If an infant as defendant in the action be arrested, or if after he has arrived at full age he be arrested for a cause of action which accrued in his infancy, he cannot be relieved upon motion; for the court will not try the question of non-age upon a mere affidavit, but defendant must resort to his plea of infancy.

History and ori-
gin of suing and
defending by
guardian and
prochein ami.

As infants are incapable, or at least presumed by law to be so, of acting for themselves, so they are not supposed to have sufficient discretion to choose a proper person as an attorney

to

to act for them. At common law, therefore, as might naturally be expected, the *guardian* of the infant was the person to prosecute and defend suits in his behalf. But inasmuch as infants were subjected in a great measure to the control and power of their guardians, who, from selfish and rapacious motives, might and too often did make a prey of their substance, instead of protecting it, and who also themselves were the very persons who disturbed and injured the infants in their right, by which means, as they could not sue in person, nor appoint an attorney, it was difficult for them to obtain redress; the legislature at length interposed, and by statute *West. 1. c. 48.* enacted, *That if an infant be esloined or disturbed by his guardian or feoffee, or any other whereby he cannot prosecute his assize, any one of his nearest friends who pleases may sue for him.* And afterwards, by statute *West. 2. c. 15.* a general privilege is allowed in all cases for minors to sue by their next friend, who is to be admitted for that purpose. Since this statute of *West. 2.* the common rule seems to have been, that an infant shall sue by *prochein ami*, and defend by *guardian*. In the books, the names of *guardian* and *prochein ami* are oftentimes taken the one for the other, because it frequently happened that they used to be one and the same, as the *guardian* in *soceage* was also *prochein ami*, &c. Afterwards, as well the *guardian* as the *prochein ami* were allowed by the judges to be some of the officers of the court, who, both in respect of their place and skill, were deemed the best *procheins amies* for the good and furtherance of the infant's cause.

But now any person, who, as friend to the infant, is willing to prosecute or defend for him, is admitted, upon proper petition and application to the court, as *guardian* or *prochein ami*.

Of Proceedings by an Infant Plaintiff.

If an infant is plaintiff, the writ may be sued out in his own name, but he must declare by *prochein ami*, or next friend, and this in all cases where he sues alone; but if he be co-executor with others of full age, and a joint action be brought by them, they may appoint and sue by attorney, being deemed only as one person in law. *Frescobaldi v. Kinston*, Str. 783.

It is for this reason that an infant cannot be plaintiff in a *qui tam* action, because the stat. 18 Eliz. c. 5. requires such suit to be exhibited in proper person, and prosecuted only in person or by attorney.

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F

The

Infants must declare by guardians.

Cannot be plaintiff in *qui tam* action.

How *prochein*
ami or guardian
appointed.

The *prochein ami* or guardian is appointed by the court, either by his appearance with the infant before a judge, or by a petition from the infant for that purpose, and a written acknowledgment from the *prochein ami* that he consents to become such guardian, and an affidavit of any indifferent person of the infant's signing such petition, and of guardian's giving such consent.

When.

This appointment should be obtained before declaration, and when the rule is obtained, a copy thereof should be annexed to declaration when delivered.

Guardian's
place of abode
how known.

If defendant's attorney wishes to know the *prochein ami* or guardian's place of abode, he may obtain rule or order for that purpose. 1 Wil. 246.

Defendant need
not plead till
guardian ap-
pointed.
Admission may
be general.

Defendant is not obliged to plead till such guardian be appointed, and the rule of court for that purpose is produced.

A general admission of *prochein ami* is sufficient, no need of a particular admission for every action. *Archer v. Frowde*, Str. 304.

Form of peti-
tion.

A petition to assign an infant a guardian, &c. is in the following form, directed to the Chief Justice of the court:

In the King's Bench,

Between

{ A. B. the younger, plaintiff,
and
C. D. defendant.

To the Right Honourable Lloyd Lord Kenyon, Lord Chief Justice of England.

The humble petition of A. B. the younger, an infant under the age of 21 years, the plaintiff in this cause, sheweth,

That your petitioner has, as he is advised, a good cause of action against the defendant C. D., for entering into and taking the mesne profits of a messuage or tenement and garden belonging to your petitioner; the possession whereof he has lately recovered against him, on an ejectment at his demise; and that your petitioner has lately brought this action against the said C. D. in this honourable court for such entry, and taking the said mesne profits; but in regard to your petitioner's infancy,

Your petitioner humbly prayeth your lordship would be pleased to assign his father J. B. the elder, as and for your petitioner's guardian, to prosecute his said suit or action against the said defendant C. D., and your petitioner shall, &c.

A. B.
The

Sec. V.] BY AND AGAINST INFANTS.

69

The foregoing petition must be signed by the Chief Justice, for which a fee is paid to his clerk; it is then carried, if in the King's Bench, to the clerk of the papers; if in the Common Pleas, to the prothonotary; who enters it, and draws up the rule of admission, and the judge's clerk files the petition, which is then considered to be of record.

The guardian's consent is as follows:

I do accept and agree to be guardian to the plaintiff A. B. an infant, according to the prayer of the above petition. Witness my hand this day of 1795.

Form of guardian's consent.

J. B.

An affidavit of the infant's signing the petition, and the guardian's consent, must then be made, to the following effect:

In the King's Bench,

Between { A. B. the younger, plaintiff,
and
C. D. defendant.

Form of affidavit necessary.

L. M. of in Gent. maketh oath, That A. B. the younger, an infant, the petitioner in the petition hereunto annexed named, on this present day of did duly sign the petition hereunto annexed in this deponent's presence: and this deponent saith, at the same time he was present and did see J. B. the elder, the person mentioned in the said petition, duly sign the acceptance or agreement thereunder written, in order to his being a guardian to the said A. B. the younger.

Sworn at, &c.

L. M.

Before, &c.

When declaration delivered, annex a copy of the rule of admission.

The petition and consent are to be written on treble 6d. stamp paper.

The *prochein ami* is liable to costs if he fails, and may be proceeded against by attachment if he refuses to pay them; but the infant himself is not responsible. Bar. 128. Str. 548. So *prochein ami* is liable to costs for not proceeding to trial. *Englefield v. Round*, Cook. Rep. 32.

Prochein ami liable to costs.

If *prochein ami* not of sufficient responsibility, court will order another who is. Str. 708.

But if the infant should be taken in execution for costs, he can only take advantage of it by writ of error, the court will not discharge him on motion. *Gardiner v. Holt*, Str. 1217.

How if infant taken in execution for them.

By the statute of jeofails, 21 Jac. 1. c. 13. if an infant, when plaintiff, appears and declares by attorney, it is cured

Infant's declaring by attorney cured after verdict.

after verdict or after judgment by default, by stat. 4 & 5 Ann. But it may be pleaded in abatement.

Of Proceeding by an Infant Defendant.

Infant must
defend by
guardian ;

An infant when defendant, must in all cases appear by guardian, whether he is sued alone or jointly, and even when sued as co-executor with others. And the reason given why an infant when he sues as plaintiff with his co-executors, may sue by attorney, but cannot when defendant in such action appear by attorney, is, that as plaintiffs they cannot sever in declaring, but as defendants they may sever in pleading. *Frescobaldi v. Kingston*, Str. 783.

which must be
appointed be-
fore plea.

Whenever, therefore, an action is brought against an infant, he must, before he puts in his plea, get a guardian appointed to appear and defend for him. This appointment is either by the guardian personally attending with him before a judge, or by petition and consent of the guardian, and affidavit thereof in the same way as before shewn in case of an infant plaintiff.

How plaintiff
can compel
such appoint-
ment.

If defendant does not appear by guardian in the time allowed by the rules of the court, the plaintiff must procure an affidavit of the service of the copy of the writ, and that defendant is an infant, and hath not appeared ; upon which, the judge, without taking out any summons, will make an order, " That unless the infant appears within six days after personal service of the order, plaintiff may assign John Doe for his guardian, and enter appearance for defendant : " and upon an affidavit of the service of this order, and shewing the original, the judge will make the order absolute ; and then an admission is drawn up and filed as aforesaid.

Plaintiff must
take care not to
proceed against
an infant with-
out his guar-
dian ;

If plaintiff has proceeded in his cause till issue, &c. upon defendant's appearance by attorney, not knowing that the defendant was an infant, and then discovers it, he should move for a rule to shew cause why the appearance in the filazer's or judge's books should not be struck out, and defendant be obliged to appear by guardian, and why record should not be made conformable to it.

If an infant be served with process to appear by attorney, the court will make a rule for him to appear by guardian, or plaintiff to be at liberty to name and to appear and defend for him. *Barnes*, 418. *Gladman v. Bateman*.

and must ap-
ply in time for
guardian to be
appointed.

And if plaintiff appears for defendant according to statute, not knowing he was an infant, and error brought, it is too late to apply to the court to amend the irregularity.

Plaintiff appeared for defendant as a person of full age by affidavit, pursuant to the statute, and proceeded to judgment :

ment: and defendant brought a writ, and it was disclosed that he intended to assign nonage for error in fact. On which plaintiff moved to strike out the appearance in person, and enter an appearance by guardian for defendant, if he did not appear and do it himself; but the court denied it, thinking the plaintiff's application too late. Barnes, 413. *Kerry v. Cade.*

Affault and battery, whereby the plaintiff lost her leg, the defendant being served with a *copias ad respondendum*, did not enter his appearance at the proper day after the return thereof; therefore the plaintiff's attorney made an affidavit of the service, entered an appearance for the defendant according to the statute in person, left the declaration in the office, gave notice to the defendant thereof, and to plead; whereupon the defendant employed Mr. Waldo, an attorney of B. R., to take the declaration out of the office, and plead the general issue, who did so in the name of one Palmer, an attorney of C. B. Thereupon the plaintiff's attorney made up and delivered the issue, gave notice of trial, set down the cause, subpoenaed witnesses, and gave briefs to his counsel; but when the cause was just coming on to be tried, the plaintiff's attorney discovered that the defendant was an infant of about 17 years old, so that he ought to have appeared and pleaded by guardian; and therefore if the plaintiff had proceeded to trial and judgment upon this record, it would have been error.

Wherefore it was now moved on behalf of the plaintiff, that the defendant or his attorney might shew cause why the appearance in the filazer's book should not be struck out, and the defendant be obliged to appear and plead by his guardian, and why the record should not be amended conformably thereto; and why the plaintiff should not have his costs, occasioned by the defendant's attorney, who must be supposed to know his client was an infant, and so had led the plaintiff's attorney on to proceed thus far erroneously; upon an affidavit of these facts, and that Mr. Waldo was a trustee for the defendant in a settlement, and must know he was not of age when he pleaded.

On shewing cause for the defendant, it appeared by affidavit, that Mr. Waldo acquainted the plaintiff's attorney, that the defendant was an infant; but this was after the plea pleaded, and he not believing it, proceeded as above.

Per curiam: In this case the plaintiff's attorney ought to have applied to the defendant to name a guardian, and if he did not do so in six days, then plaintiff ought to have applied to the court to oblige him so to do; and it was the plaintiff's attorney's own fault to proceed erroneously, although

How if he enters appearance according to statute when defendant is an infant, not knowing that fact.

Plaintiff's attorney should apply to defendant to name his guardian.

no notice had been given to him that the defendant was not of full age; and if the plaintiff had proceeded to judgment, and error had been brought, and afterwards the plaintiff had moved here to have made the record right, this court would not have done it; and therefore as to costs, there is more reason that the plaintiff should pay costs for being permitted to have the record made right, than that the defendant should pay costs to the plaintiff; however, as costs have not been prayed by the defendant, let the defendant plead by guardian in six days, and let the record be made agreeably thereunto without costs of either side. *Shipman v. Stevens*, 2 Wil. 50.

How if infant appears by guardian without rule of court.

If an infant appears by guardian before he obtains rule of court, it is only a misdemeanor in the attorney, but not error; but if he appear by attorney it is error. 1 Crom. 158.

How if attorney undertake to appear for defendant an infant.

An attorney undertook to appear for the defendant an infant, and entered it by mistake *per attornatum*. *Per cur.* It may be amended, and made *per guardianum*, for he is bound to appear in a proper manner. *Stratton v. Burgis*, 1 Str. 114.

Replication to plea of infancy.

But this is only where the attorney has expressly undertaken to appear for defendant. *Power v. Jones*, Str. 445.

In replying to a plea of infancy, the plaintiff must shew enough in the replication to maintain every part of the declaration; and if a replication which is entire be bad as to part, it is bad as to the whole. *Ibid.* 40.

Infant not liable on account stated.

Assumpsit on an account stated does not lie against an infant. *Truman v. Hurst*, 1 T. R. 40.

Even though the particulars of the account were for necessities. *Bartlett v. Emery*, Hil. 2 G. 2. B. R. cited in *Truman v. Hurst*, *Ibid.* 42.

What evidence necessary if plaintiff replies a subsequent promise.

If the plaintiff reply to a plea of infancy that the defendant, after he had obtained twenty-one, confirmed his promise, and the defendant rejoin that he did not, the plaintiff need only prove a promise, and the defendant must shew that he was under age at the time. *Borthwick v. Carruthers*, *Ibid.* 648.

Infant defendant liable to costs.

An infant defendant (though a guardian appointed) is liable to costs, if verdict be against him. Dy. 104. 1 Bul. 189. Str. 1217. *Gardiner v. Holt*.

If he appears by attorney, it is error.

The statutes of *jeofails* do not cure the error of an infant, when defendant, appearing by attorney; it only extends to infants when plaintiffs.

SECTION VI.

Of Proceedings against Justices of the Peace, Constables, Revenue Officers, &c.

For the encouragement of magistrates and other officers in the execution of their duty, and in order to protect them from vexatious prosecutions, the legislature hath prescribed certain forms and rules which must be strictly adhered to, in all actions brought against them for any thing done by virtue of their authority, or under colour of their respective offices.

As to Proceedings against Justices.

Actions must be brought in the county where the fact was committed. 21 Jac. 1. c. 12.

No action shall be brought against any justice for any thing done in the execution of his office, unless commenced within six calendar months after the act committed. Stat. 24 G. 2. c. 44. s. 8.

And before any writ is sued out against, or copy of process served on any such justice, notice in writing of such intended writ must be delivered to him, or left at his usual place of abode, or served at least one calendar month before the suing out of such writ; in which notice shall be contained, the cause of action which the party suing claims to have against such justice of the peace; on the back of which notice shall be indorsed the name and place of abode of plaintiff's attorney or agent, who shall be entitled to 20s. for preparation and service of such notice. s. 1.

For form of such notice see

Unless plaintiff at the trial proves that such notice was given, he cannot have a verdict, but the justice shall have a verdict and costs. s. 3.

The notice must contain fully the cause of action, and no evidence shall be given on the trial of any cause of action, except such as is contained in the notice. s. 5.

And it must state the nature of the *trial or process* to be issued, for the mere saying that an *action* will be brought, is not sufficient.

Plaintiff nonsuited on a defective notice, for want of the indorsement of the attorney's name and place of abode. *Ferguson v. Addington*, 38 G. 3.

Within one calendar month after such notice given, the justice may tender amends to the party complaining, or to

Proceedings against justices.

Venue.

Limitations of time.

Notice requisite.

which must be proved.

Its contents.

Justice may tender amends;

his agent or attorney; and if not accepted, he may plead such tender in bar together with not guilty, and any other plea with leave of the court; and if on issue joined, the jury shall find the amends so tendered sufficient, then they shall give a verdict for the defendant; in which case, or in case the plaintiff shall become nonsuit or discontinue, or in case judgment shall be given for such defendant on demurrer, such justice shall be entitled to the like costs as he would have been entitled to in case he had pleaded the general issue only: and if the jury find no amends tendered, or not sufficient, and also against the defendant on such other plea or pleas, then they shall give a verdict for the plaintiff, and damages, which he shall recover with costs. s. 2.

or bring money
into court.

In case such justice shall neglect to tender amends, or shall have tendered insufficient amends before action brought, he may pay into court, any time before issue joined, such sum of money as he shall see fit. s. 4.

May plead ge-
neral issue.

Defendant may always plead the general issue, and give special matter in evidence. Stat. 7 Jac. 1. c. 5.

Plaintiff's
costs.

Where the plaintiff shall obtain a verdict, in case the judge shall in open court certify on the back of the record, that the injury was wilfully and maliciously committed, he shall be entitled to double costs. s. 7.

Defendant's.

If defendant gains a verdict, he shall have double costs, by stat. 7 Jac. 1. c. 5. See Vol. I. p. 494.

The form of
notice to the
justice that an
action will be
commenced
against him
for issuing a
distress war-
rant.

" Pursuant to an act of parliament, made and passed in
" the 24th year of the reign of his majesty king George
" the Second, intituled, *An Act for rendering justices of the*
" *peace more safe in the execution of their office, and for indem-*
" *nifying constables and others acting in obedience to their war-*
" *rants*: This is to give notice, that a *latitat* (or as the
" *process may be*) is intended to be sued out of his majesty's
" court of King's Bench, against you and one C. D. at the
" suit of A. B., in a plea of trespass; for that you and the
" said C. D. on the day of in the year of
" our Lord 1796, with force and arms (a), broke and entered
" the dwelling-house of the said A. B., situate, standing,
" and being in the parish of and stayed and con-
" tinued in the said house for a long time, to wit, for the
" space of ten hours, and during that time greatly disturbed
" the said A. B. in the peaceable and quiet possession and
" occupation of his said house; and seized, took, and car-
" ried away the goods and chattels following: to wit, one
" mahogany table (*here set forth the goods*) of the said A. B.
" of the value of 20 l. there then found in the said dwelling-
" house,

(a) Or whatever
the offence may
be, which must
be here accu-
rately stated.

" house, and converted and disposed thereof to your own
 " use, to the damage of the said A. B. of 50*l*. Dated this
 " day of 1798.

To E. F. Esq. one of his Majesty's
 Justices of the Peace for the
 County of Middlesex.

" T. S. Attorney for
 " the said A. B.
 " Red-Lion Street,
 " Clerkenwell."

As to Proceedings against Constables.

The action must be brought within six calendar months
 after the act committed. 24 G. 2. c. 44. s. 8.

And in the county where fact was committed. 21 Ja. 1. c. 12.

No action shall be brought against any constable or other
 officer, or against any person acting by his order and in his
 aid, for any thing done in obedience to any warrant of any
 justice, until demand made or left at the usual place of his
 abode by the party intending to bring such action, or
 by his attorney or agent, in writing, signed by the
 party demanding the same, of the perusal and copy
 of such warrant, and the same hath been refused or
 neglected for the space of six days after such demand; and
 in case after such demand and compliance, by shewing the
 said warrant to, and permitting a copy to be taken thereof,
 by the party demanding the same, any action shall be brought
 against such constable, &c. for any such cause, without
 making the justices defendants, that on producing and pro-
 ving such warrant at the trial, the jury shall give a verdict for
 the defendant, notwithstanding any defect of jurisdiction in
 such justice; and if such action be brought jointly against
 such justice, and also against such constable, &c. then, on
 proof of such warrant, the jury shall find for such con-
 stable, &c. notwithstanding such defect of jurisdiction, and
 if the verdict shall be given against the justice, that in such
 case the plaintiff shall recover costs, to be taxed so as to in-
 clude such costs as such plaintiff is liable to pay to such de-
 fendants for whom such verdict shall be found. s. 6.

Defendants may plead general issue, and give special mat-
 ter in evidence. 7 Jac. 1. c. 5.

Plaintiff shall also be entitled to double costs if judge cer-
 tifies the injury to be wilful and malicious. s. 7.

If defendant has a verdict, he shall have double costs.
 Stat. 7 Jac. 1. c. 5.

" Mr. C. D.

" Whereas, on or about the day of
 " 1796, you entered into and upon the dwelling-house of
 " A. B. &c. and then and there made distress of, took,
 " seized, and carried away a mahogany table, (here set out

Proceedings
 against constables.
 Limitation of
 time.

Demand of
 warrant, &c.

May plead ge-
 neral issue.

Costs of plaintiff
 and defendant.

Notice to the
 constable to de-
 mand a copy of
 the warrant.

"the goods,) the property of the said A. B. under colour
 "or pretence of some warrant or warrants of some justice
 "or justices of the peace, empowering you so to do: Now
 "in pursuance of an act of parliament, passed in the 24th
 "year of the reign of his late majesty king George the Se-
 "cond, for rendering justices of the peace more safe in the exe-
 "cution of their office, and for indemnifying constables and
 "others acting in obedience to their warrants; I do hereby, on
 "the behalf of and as the attorney for the said A. B. de-
 "mand the perusal and copy of all and every warrant and
 "warrants, under and by virtue of which you entered,
 "seized, and made distress of and carried away the said
 "mahogany table, and other the goods as aforesaid.

"T. S. Attorney for the
 To Mr. C. D. of, &c.

"said A. B.

"Red-Lion Street, Clerkenwell."

As to Proceedings against Officers of Excise and Custom-House Officers.

Proceeding
 against excise
 officers;

The former are governed by stat. 23 Geo. 3. c. 70. and are nearly the same regulations as above prescribed in proceedings against justices, with respect to the necessity of a previous notice one calendar month before the action brought, the notice to contain the cause of action, the names and places of abode of the plaintiff, and of his attorney or agent; nothing out of the notice to be given in evidence, a power of tendering amends, and of bringing money into court and the like, except that in proceedings against these officers the action must be brought within *three* months next after the cause of action shall arise, and not afterwards, and shall be laid and tried in the county and place where the facts were committed, and not in any other county or place, and the defendant may plead the general issue, and give the special matter in evidence, and if the plaintiff shall be nonsuited or discontinued, or if upon a verdict or demurrer judgment shall be given against the plaintiff, the defendant shall recover *treble* costs. s. 34.

custom-house
 officers;

By 24 Geo. 3. c. 70. the proceedings against custom-house officers are regulated, and are precisely the same as against excise officers.

They both extend to persons acting by the order or in aid of such officers.

churchwardens
 and overseers.

By statute 21 Jac. 1. c. 12. the provisions of the 7 Jac. 1. c. 5. are extended to churchwardens and overseers of the poor, which gives the general issue and double costs if verdict be for defendant.

"Mr.

" Mr. E. F.

" You having on the day instant, as an
" officer of his majesty's excise or customs, seized, taken,
" and carried away a large quantity of tobacco, to wit,
" two hundred pounds weight of tobacco, the property
" of A. B. of, &c. tobaccoist. I do therefore, (according
" to the statute in such case lately made and provided,) as
" attorney for the said A. B., hereby give you notice, that I
" shall, at or soon after the end of one calendar month from
" your being served with this notice, sue out of his majesty's
" court of King's Bench at *Westminster* a certain writ called
" a *latitat* against you, for the said trespass, and shall pro-
" ceed thereon to judgment according to the rules and prac-
" tice of the said court. Dated this day of
" 1798.

Notice to be
given to excise
officer before
action com-
menced.

" Your's, &c.

To Mr. E. F. of, &c.

" T. S. Attorney for said A. B.
" Red-Lion Street, Clerkenwell."

OBSERVATIONS.

The privileges under the above acts only extend to cases where the justices, constables, or officers are acting in execution of their offices.

To what cases
the acts extend.

It does not extend to private quarrels, Str. 446.; nor to cases where the constable, though he might have a warrant, does not act in obedience to it; as if he takes up a wrong person not mentioned in the warrant. *Money v. Leach*, 3 Burr. 1742.

Only where de-
fendants acted
colore officii.

But though the act be not strictly warranted by his official capacity, yet if done *bond fide* in the supposed execution of his duty; as where an excise officer assaulted an innocent person on the suspicion that he was a smuggler, he comes within the act. *Daniel v. Wilson*, 5 D. & E. 1.

The acts only extend to cases of *torts*, not to actions of another nature brought against officers.

Only to torts.

As actions of *assumpsit* for money had and received. *Feltham v. Perry*, Bull N. P. 24.

A secretary of state is not a justice of peace, nor his messengers constables, within the stat. 24 Geo. 2. *Entick v. Carrington*, 2 Wil. 275.

To what per-
sons they ex-
tend.

But an overseer of the poor who distrains for a poor's rate under a justice's warrant is within the act. *Nutting v. Jackson*, Bull. N. P. 24. *Espin*. 340. *Harper v. Carr*, 7 D. & E. 270.

So is the lord of a manor, who is also a justice in an action against him for taking away a gun, for it will be pre-
sumed

furnished he acted as a justice. *Briggs v. Sir Frederick Edelyn*, 2 H. Bl. 114.

How plaintiff may proceed on defendant pleading tender.

If the justice pleads tender of amends under the statute, plaintiff may have a rule for defendant to bring the money into court, that he may take it out and discontinue. *Lawrence v. Cox*, Bull. N. P. 24.

How if defendant moves to pay money into court.

If the justice omits to tender amends, and afterwards moves to pay money into court, it must appear that the action is brought against him for something done as a justice in the execution of his office. *Casbourn v. Ball*, 2 Blac. 859.

This will appear by proper affidavit and annexing plaintiff's notice of action, which shews defendant to be sued as a justice.

What service of notice good.

Notice by the act may be left at the dwelling-house, and indeed, generally speaking where it is required by law that notice shall be given to a party before he shall be affected by any act, leaving it at his dwelling-house is sufficient. *Jones v. Marjib*, 4 D. & E. 465.

What shall be commencement of action within the act.

The time of limitation is strictly adhered to; nor can an action be maintained against officers of the customs for seizing goods as forfeited by the revenue laws, unless it be brought within three months after the actual seizure, notwithstanding a suit is instituted in the court of Exchequer, for the condemnation of the goods which is depending at the expiration of the three months. *Codin v. Ferris*, 2 H. Blac. 14.

Subsequent acts do not confer protection of prior acts, unless so expressed.

Where an act confers certain privileges on officers who may be sued for things done in pursuance of that act, and a subsequent act imposes new obligations on the old officers, the privileges of the former statute do not attach on them in respect of things done under the latter. *Bazing v. Skelton*, 5 D. & E. 16.

Therefore toll-gate keepers sued for acts done under the 25 Geo. 3. c. 51. need not be sued in the county where the fact was committed, as they must be under the 13 Geo. 3. c. 78. s. 81. *Ibid.* 16.

As to laying the *venue* in such actions, see Vol. I. Ch. vi. Sec. 2. (A).

SECTION VII.

Of Proceedings by and against Corporations.

By corporations.

If a corporation sue, they must sue in the name of the corporation, by an attorney appointed under the seal of the corporation. They may sue in the common way by *latitat* or *capias*.

But

But if a corporation is sued, it must be sued by its name of incorporation by original writ; and in order to sue a corporation, the plaintiff's attorney must make out a *præcipe* for an original writ, which original writ must be made out by the curfitor of the proper county, and duly filed with the filazer in B. R. or *custos brevium* in C. P. on which a summons must be made out, containing the whole cause of action for the sheriff to summon them, whose officer may serve it upon the town clerk, upon which, if they appear, the proceedings are the same as in other cases; but their appearance must be by an attorney appointed under the common seal, and not in their own persons. Bro. Corp. 28.

Against corporations.

By original and distringas.

In general the town clerk undertakes for appearance, or some attorney appointed by them (a).

If they do not appear upon the summons at the return of the original writ, get writ returned *summoneri feci* by sheriff, then take out a *distringas* and proceed against them by distress infinite: and it is not sufficient if the particular persons distrained upon appear at the return of the process; Bro. Corp. 28.; or if all the members of the corporation appear in person; but they must appear by an attorney appointed under seal.

How issues directed to be returned.

Should the sheriff return but small issues on the *distringas*, the court on motion will order him to return greater.

In an action against the East India Company for 5000*l.*, it was moved, that the sheriff return exemplary issues, because several writs of *distringas* had been already served to no purpose; and the court said, he should return good issues; and if he did not, the plaintiff might bring an action against him; but at last he was ordered to attend. Salk. 191. pl. 2.

It is now settled that a corporation is not entitled to an effoin. 2 D. & E. 16.

No effoin.

If corporation be sued by *capias*, and plaintiff enter an appearance according to statute, proceedings will be set aside, because they should be sued by *pone* and *distringas*; but if defendants themselves appear, the objection is waived. Langley v. Bailiffs, &c. of East Retford, Bar. 415.

If sued by *capias* how objection waived.

Corporations aggregate must sue and be sued by attorney, and therefore the proper process against them is a *distringas*. Co. Lit. 66.

General observations as to corporations.

(a) Form of declaration against a corporation is, The Mayor, &c. of (let title of corporation be correct) were summoned to answer A. B. in a plea of trespass on the case, &c. And thereupon the said A. B. by his attorney complains, for that whereas the said Mayor, &c.

Appearance is entered with filazer, form of *præcipe* is

Appearance for the Mayor, &c. of

against A. B. re an original

T. S. Attorney.

A cor-

A corporation cannot be effoined. Dalt. 121. pl. 154.

Nor outlawed. 10 Co. 32. b.

No attachment lies against a corporation.

A corporation cannot be declared against, as in the custody of the marshal. 6 Mod. 183.

A corporation cannot sue as a common informer. 2 Stra. 1241.

As outlawry does not lie against an aggregate corporation, therefore trespass does not lie against them; for a *capias* and *exigent* do not go. Bro. Corp. 43.

Corporations aggregate cannot distrain in their own persons, but by their bailiff; therefore replevin does not lie against them by the name of their corporation. Brownl. 175.

Corporations cannot sue without their head; or, in time of vacation of their headship. Wood's Instit. 110.

And if mayor and commonalty bring an action, and the mayor dies, the writ abates. Salk. 398.

Corporations aggregate cannot commit treason, or be outlawed or excommunicated; 10 Rep. 32. 1 Rep. 127. 1 Inst. 134. a. Or be executors or administrators. *Ibid.* Though 1 Roll. Abr. 915. *contra*. But *quere?* for they cannot take an oath.

They cannot be joint tenants to take by survivorships, but they may be tenants in common. Wood's Instit. 110.

They cannot be seised to the use of another. *Ibid.*

The members cannot regularly be witnesses for the corporation, especially if they testify for any considerable advantage or profit of the body, 2 Lev. 232. 236. 2 Str. 1069; for every member hath a right and freehold for his life as to his freedom, and all the members together have an inheritance in the lands, and an interest in the goods.

But they may disfranchise a member for that purpose.

Corporations aggregate cannot be bound without deed, therefore no action lies against them, unless founded on a deed. But an action will lie against a corporation sole upon a promise; the party's remedy for non-performance is by bill in equity, to compel a specific performance, as to make a new lease, &c.

As to inspecting books, &c.

Where a corporation is plaintiff in a civil action, leave to inspect their books is granted to the defendant of course. *The Mayor of Lynn v. Danton*, 1 T. R. 689.

Though in an action by a corporation against a stranger, the court will give the defendant leave to inspect papers, &c. relating to the question. *Corporation of Barnstaple v. Leathey*, 3 T. R. 303.

Where a rule had been granted for a *quo warranto* information against A. as mayor of B. on the relation of some of the

the corporators, and another rule in that cause for inspecting all the corporation books, papers, &c. directed to the town-clerk; an inspection of such only as related to the election and office of mayor was held to be sufficient compliance with the latter rule, so as to protect the town clerk from an attachment as for a contempt of the court; it appearing, that he had acted *bonâ fide*. *R. v. G. Ball, 3 T. R. 579.*

SECTION VIII.

Of Proceedings against Hundredors.

In order to render it one common interest for the inhabitants of a district to preserve peace and prevent depredation, the legislature hath enacted, by various acts of parliament, that for certain offences described therein, the hundred shall be liable to the party injured for the loss or damage thereby sustained by him, within the limits of that hundred.

The oldest statutes upon this head are 3 Edw. 1. and 13 Edw. 1. rendering the hundred liable in case of robberies, commonly called the statutes of hue and cry, followed by subsequent statutes of 27 Eliz. c. 13. 29 Car. 2. c. 7. 8 G. 2. c. 16. 22 G. 2. c. 24.

But by other statutes, the hundred is made liable in case of other offences: as 7 & 8 W. 3. c. 2., for exportation of wool; 1 Geo. 1. c. 5., for pulling down buildings, upon which were several prosecutions, in consequence of the riots in London in the year 1780; 9 Geo. 1. c. 22., for killing cattle, cutting down trees, setting fire to barns, buildings, stacks of hay, corn, &c.; 8 Geo. 2. c. 20., for destroying turnpikes or works on navigable rivers; 10 Geo. 2. c. 32., for cutting hop binds; 11 Geo. 2. c. 22., for destroying corn to prevent exportation; 19 Geo. 2. c. 34., for wounding officers of the customs; and 29 Geo. 2. c. 36., for destroying woods, &c.

Sometimes the hundred is only made liable to a certain amount, and different restrictions are imposed in the different statutes; but the proceedings in prosecutions upon them (which is the only thing necessary to be considered in this place) are nearly similar; and by briefly shewing how to proceed against the hundred upon the statutes of hue and cry, the proceedings in other cases, by referring to the particular statutes which govern them, may be easily known.

If an action be commenced against hundredors, the suit in B. R. as well as in C. B. must be by original (that is, if the hundred generally are to be sued; but if the suit be against

How proceeding to be.

against two of the inhabitants of the hundred in the name of the rest, the suit may be by bill in B. R.); for the inhabitants of an hundred cannot be in custody of the marshal. 3 Keb. 126. 2 Saund. 375. 4 Mod. 296.

When to be commenced.

To proceed against an hundred on the statute of hue and cry, 13 Edw. 1. the plaintiff must take out his original writ, which must be tested forty days after the robbery, (which forty days are allowed for the hundred to take the thieves by the statute of Winton, R. 3 Lev. 320.) and within a year after the robbery. R. 1 Brownl. 156.

Prepare *præcipe* and get original from cursitors of proper county.

The original writ usually recites the statute. H. B. 141. 2 Saund. 374. 4 Mod. 296. 1 Bro. Ent. 99. But the recital of the statute is not necessary; though it must state the circumstances of the robbery, and the plaintiff's compliance with the statutes, viz. that he made hue and cry, gave notice of the robbery, described the felons, the time and place of the robbery; that within twenty days he caused notice thereof to be given in the London Gazette, described the robbers and robbery therein; that he entered into bond before the sheriff to the high constable of the hundred, with condition for the security of the costs, in case of being nonsuited, discontinuing, &c.; that twenty days before the issuing of the writ, he made oath before a justice, that he did not know the parties who robbed him, and that the inhabitants of the hundred have not taken the robbers, &c.

The process served is a copy of the original writ, which process formerly used to be served on some inhabitant of the hundred. But by the 8 Geo. 2. c. 16. it is enacted, "That
 " no process for appearance in any action to be brought
 " upon the statutes of hue and cry, or either of them,
 " against any hundred, shall be served on any inhabitant
 " thereof, save only upon the high constable, or high constables of the hundred wherein the robbery shall happen;
 " who is required to cause public notice thereof to be given,
 " in one of the principal market-towns within such hundred, on the next market-day after he or they shall be
 " served with such process: or if there shall happen to be
 " no market-town within the hundred, then in some parish
 " church within the same hundred, immediately after divine service on the Sunday next after his or their being
 " served with such process: and he or they is and are
 " hereby empowered and required to enter, or cause to be
 " entered, an appearance in the said action, and also defend
 " the same for and on behalf of the inhabitants of the said
 " hundred, as he or they shall be advised."

The

The defendants must enter appearance with the filazer on the *quarto die post* of return of original.

The declaration must be against the inhabitants of the hundred generally; for if it is against any by name, and all are not named, it will be bad. R. 2 Keb. 126.

The declaration need not recite the original at large, Reg. 1654. Mills, 26.; nor more of the statute than is pertinent to the action, 2 Ventri. 215.; and must conclude *contra formam statuti*; i. e. the statute of Winton: for *contra formam statutorum* is bad. Yelv. 116.

If no appearance entered, sue out *distingas* against all or any of defendants, and so an *alias* and *pluries*; and sell the issues under 10 Geo. 3. as directed *ante* Sec. i.

If the defendants plead, and there is an issue, the *venire facias* shall be awarded to the next hundred. Thes. Brev. 144. *Quare?* for since the 29 Geo. 2. c. 18. s. 3. it seems the *venire* should be awarded *de corpore comitatus* (except the hundred against which the action is brought).

If judgment be given against the hundred, the sheriff, &c. upon receipt of any writ of execution against any inhabitant, instead of serving the same, shall cause the same to be shewn *gratis* to two justices of the county, riding, or division, (whereof one to be of the quorum,) who are to cause such taxation and assessment to be made and to be levied according to the 27th Eliz. viz. by the constables, &c. rateably and proportionably, &c.; in which taxation and assessment, there shall be provided and included, over and above what the costs and damages recovered by the plaintiff in such action shall amount to, all such just and necessary expences, which the high constable of the hundred hath been at in defending such action; claim being made thereto by such high constable, before the said justices, upon due notice for that purpose given him; and the money so to be levied, to be paid over by such constable, &c. within ten days after collection, to the sheriff of the county, to the use of the plaintiff in such action, for so much as his costs and damages recovered shall amount unto, and to the use of the said high constable, for so much as his expences shall amount to; of which he shall give an account, and make proof thereof upon oath, to the satisfaction of the said justices, before any taxation shall be made for reimbursing such high constable; and shall, in such expences, have no further allowance towards paying an attorney to defend the said action, than what such attorney's bill shall be taxed at by the proper officer of that court where the action shall be brought, which the said high constable shall cause to be taxed for that purpose. Stat. 8 Geo. 2. c. 16. s. 4.

The 7th section of the above act provides in what manner the constable shall be reimbursed his expences, in case the plaintiff is nonsuited, &c. and becomes, or his sureties in the bond become, insolvent.

And by the 22 Geo. 2. c. 46., in all executions against inhabitants of any hundred, on any judgment obtained by virtue of any act of parliament whatsoever, the same mode is to be observed as directed in the above statute of 8 Geo. 2. c. 16. s. 4.

What to be
proved on stat.
1 Geo. 1. c. 5.

To support an action against the hundred for damages on the 1 Geo. 1. st. 2. c. 5 for the riotous demolition of a house, it is not necessary to prove that twelve rioters were assembled at the time. *Prichitt v. Waldron*, 5 T. R. 14.

Trustee may
maintain the
action.

Such an action is maintainable by a trustee in whom the legal estate is vested for existing purposes; and (as it seems) even by a bare trustee of a satisfied term. *Ibid.*

Of the order of
justices on the
riot act.

An order of justices for the levying of money upon the inhabitants of an hundred under the riot act, directing that the money when levied shall be paid into the hands of a banker, subject to their further order, is bad. *Rex v. Inhabitants of the Hundred of Halffshire*, *Ibid.* 341.

The money should be directed to be paid to the party entitled. *Ibid.*

How writ of
execution
should go.

A writ of execution sued out by the party who has recovered damages against the hundred, and delivered by the sheriff to the justices, is a good foundation for an order to levy the amount. *Ibid.*

The order for levying the damages ought to be upon the inhabitants of the "towns, parishes, villages, and hamlets," pursuant to the 27th Eliz. and not upon the inhabitants of the districts and parishes within the hundred. 5 T. R. 341.

SECTION IX.

Of Proceedings by Paupers.

The enormous expence attendant upon a law suit, which is a general cause of complaint to all, would to the poor and indigent be an absolute hindrance to the recovery of their just right by any legal remedy. From motives of compassion, therefore, and for the advancement of justice, the legislature hath ordained, "That every poor person who shall have cause of action, &c. shall have original writs, &c. nothing taking for the same. Counsel, attornies, and all other officers requisite and necessary for the speed of the said suits to be had and made, who shall do their duties without any reward." Stat. 11 H. 7. c. 12.

A poor

A poor person within this statute must not be worth 5*l.* Who deemed a pauper. in the world (wearing apparel and his right to the matter in question only excepted); a sum, it must be confessed, considering the present value of money, not agreeable to the spirit of so remedial a law.

It is observable too, and to be lamented, that the statute Statute only extends to plain- tends to plain- tiffs. does not extend its relief to paupers, who are defendants, Bar. 328. So that, however unjustly they may be sued, the extra costs of an action may prove their ruin, notwithstanding a verdict in their favour.

The mode of proceeding is by petition to one of the judges of the court, to be admitted to sue *in formâ pauperis*, to which must be annexed an affidavit of plaintiff's poverty.

The petition is engrossed on treble 6*d.* stamp paper, and is as follows:

In K. B.

J. S. Plaintiff,
P. Q. Defendant.

To the Right Honourable Lloyd Lord Kenyon, Lord Chief Justice of his Majesty's Court of King's Bench. Form of petition.

The humble Petition of J. S.

Sheweth,

I humbly conceive that the said petitioner hath good cause of action against the above-named P. Q. and humbly accept to be his counsel.

J. M.

That the said defendant is justly indebted unto your petitioner in the sum of 20*l.* (or whatever the cause of action may be), and your petitioner hath not as yet commenced any action against him, being unable to carry on the said cause on account of his extreme poverty, as appears by the affidavit hereto annexed. Your petitioner therefore must humbly pray your Lordship, that he may be admitted *in formâ pauperis* to prosecute his said action, and that A. B. Esq. may be assigned to him as his counsel, and C. D. his attorney, to prosecute his said suit. And your petitioner shall ever pray, &c.

In the margin of which petition, in order to prevent frivolous applications, must be inserted as above, and signed by counsel, or in C. B. by a serjeant, the petition being the same, *mutatis mutandis*.

If the action is commenced, for still the party may apply, say in petition, "That your petitioner hath commenced an action against him for the same; but that your petitioner finds himself unable," &c.

To the petition is annexed the following affidavit, written on treble 6*d.* stamp paper:

"T. S. of, &c. labourer, maketh oath and saith, that he is not worth 5*l.* in the world (save and except his wearing apparel, and the matter in question in this cause)."

Carry petition and affidavit to judge's chambers, swear the latter, and clerk will make out proper order; pay him 2s. 6d.

No rule is drawn up.

Exempts plaintiff from fees.

After this all future proceedings are without stamps, as the writ, pleadings, record, *venire, distringas*, &c. The paper-book is made up for nothing, nor any fees paid to the officers, the attorney, or counsel.

On pain of being dispaupered.

Indeed, if the party give any fee or reward to his counsel or attorney, or make any contract or agreement with them, he shall be dispaupered and not admitted again in that suit.

Except he recovers a verdict.

It seems, that if the plaintiff recover a verdict (which I believe must be above 5*l.*) the officers claim their fees. This however might sometimes defeat the end of the statute, and a pauper might be out of pocket, though he had such a verdict.

Extent of admission;

The admission only extends to the particular action in which it is granted; to every suit (if the pauper has more than one) there must be a fresh petition.

of the declaration;

To the declaration, which is in the usual form, annex a copy of the judge's order of his admission.

of the issue-money;

A pauper plaintiff is not entitled to the issue-money; and if he sign judgment, because defendant does not pay it, the court will set it aside. *Codron v. Hayman*, 5 D. & E 509.

of costs.

He is not liable to pay costs, not even if he be nonsuited; or if judgment as in case of a nonsuit; *Blook v. Lee*, 3 Wil. 24.; but it is at the discretion of the court to dispauper him. Stat. 23 Hen. 8. 2 Sal. 506. *Rice v. Brown*, 1 P. & B. 36.

Or defendant may move to have him dispaupered; but unless something vexatious appears in his conduct, the court will discourage the motion.

Though it is said he is liable to pay costs for not proceeding to trial, and for all defaults for which an executor would pay. *Walker v. Parker*, Cook. Rep. 47.

Of a second action, costs of first not paid.

If he be nonsuited, and afterwards bring a second action for the same cause, court will not compel him to pay the costs of the first; but if his conduct has been vexatious, as giving six notices of trial, and not proceeding, the court will dispauper him. Str. 878. 982.

But if a plaintiff after being nonsuited (not *in formâ pauperis*) brings a fresh action, and then sues *in formâ pauperis*, court will stay proceedings till the costs of the first are paid. *Weston v. Withers*, 2 D. & E. 511.

But although a pauper, as such, can never pay costs; yet, it seems, he may receive them for the defaults of his opponents. *Rice v. Brown*, 1 P. & B. 39.

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C H A P. XIV.

Of Proceedings in particular Actions, personal and mixed.

I. *Ejectment.*II. *Penal Actions.*III. *Replevin.*IV. *Scire facias to revive Judgment.*I. *Of Proceedings in Ejectment.*

THE action of ejectment (as it is now modelled) is a mere creature of Westminster-hall, an ingenious fiction for the trial of titles to the possession of lands, introduced within time of memory, and moulded gradually with great care and attention into a course of practice, by the rules of the court. All the niceties and embarrassments, with which real actions are entangled, are thereby now avoided, and titles are tried with more ease and dispatch, and less expence.

As it is now the remedy generally adopted for recovering premises wrongfully withheld, let the estate be what it may, whether fee simple, fee-tail, for life or years, it is of great importance for the student and practitioner to be well acquainted with the nature and origin of the present modern practice, the several rules of court and acts of parliament by which it is regulated, and in what cases the old method of ejectment is still to be pursued.

It may be proper therefore to consider—

SEC. 1. *The Nature and Origin of the present modern Action of Ejectment.*

SEC. 2. *Of the Proceedings therein in ordinary Cases, and when the Action should be brought. And herein,*

(A) Of the Declaration and the Service thereof.

(B) Of Judgment against the Casual Ejector for Want of Appearance.

G 3

(C) Of

(C) Of the Appearance of the Tenant, or of the Landlord, under the Statute 11 Geo. 2. and of the Consent Rule.

(D) Of the Proceedings from Appearance to Trial.

(E) Of the Trial and its Incidents.

(F) Of the Judgment and its Effect.

(G) Of new Trial and Arrest of Judgment.

(H) Of the Execution.

(I) Of the Writ of Error.

(K) Of Proceedings by Original in K. B.

SEC. 3. *Of Proceedings in Ejectment in particular Cases.*

(A) By Landlord against Tenant on Stat. 4 G. 2. And herein of the Proceedings by Justices on the 11 G. 2.

(B) Where the Premises are untenanted and the Case is not within the Statutes 4 Geo. 2. or 11 Geo. 2.

(C) Of Proceedings by Mortgagee.

(D) Of Proceedings by Corporations.

(E) Of Proceedings in Inferior Courts.

(F) Of Proceedings by and against Infants.

SEC. 4. *Of the Action for Mesne Profits.*

SEC. 5. *General Observations on the Proceedings.*

(A) Of amending the Proceedings in Ejectment.

(B) Of Consolidating Actions.

(C) Of bringing a new or second Ejectment, and of staying Proceedings till Costs of first are paid.

(D) Of Security for Costs in other Cases in Ejectment.

(E) Of quieting Plaintiff in his Possession after Judgment and Execution in Ejectment.

SECTION I.

The Nature and Origin of the present Action of Ejectment.

Actions are in general divided into real and personal; but an ejectment is in its nature both; it is therefore called a mixed action; for it is real in respect of the land, and personal in respect of the damages and costs.

By the ancient common law, the only method of recovering the possession of land was by real action, by writ of entry or assize, and this in no case where the estate was less than freehold; for a mere leasehold interest, or term for years, was, in the early period of our constitution, deemed of such little import, that no remedy was provided, whereby the tenant could regain his possession, in case he were ousted by his landlord, or by a stranger. Against the former he could only proceed upon his breach of covenant or agreement: against the latter he might indeed have his writ of ejectment, but could thereby only recover damages, not the possession.

Thus were our laws materially defective. For though the freeholder, if disseised, might resort to his real action, yet that was not only dilatory, intricate, and expensive, but at last the possession was thereby only regained, and no damages for the expulsion given; and on the other hand the termor, if he were ousted, could only by his action of ejectment recover damages and not the possession.

In those times the ejectment was a mere personal action of trespass, and the proceedings were by *pone*, or by *capias*, and distress infinite.

In progress of time, (some say so early as the reign of Edward IV. 3 Blac. Com. 201. but certainly about the time of Henry VII. when long leases began to creep into use,) the remedy by ejectment was extended and rendered more efficacious, by the object of the action being entirely changed, and the term itself thereby recovered.

This was effected by the courts of law coming to a resolution to give judgment in ejectment, that the lessee in ejectment should recover possession of the land itself by the process of an *habere facias possessionem*.

One cogent reason perhaps, which induced the courts of law to take this step, was a jealousy of the vast increase of business then flowing into the courts of equity, by the lessees

Ejectment a mixed action.

Remedy at common law by real action.

by ejectment.

Laws defective in that respect.

When alteration took place.

and how in ejectment possession was recovered.

What induced this alteration.

of the long terms applying there to get relief when molested, and to secure their possessions against strangers by a perpetual injunction, or against their lessors by a specific performance.

But be the cause what it may, the alteration was productive of the most salutary effect.

Ejectment since
been under con-
trol of court.

From this period the practice in ejectment became wholly subject to the control of the court, and a new method of trial, unknown to the common law, was introduced.

Old practice ex-
plained by steal-
ing lease.

It now became usual for a man that had a right of entry into any lands to enter thereon and seal leases; and then the person that next came on the freehold, *animo possidendi*, was accounted an ejector of the lessee; by which means any man might be turned out of possession; because the lessee in ejectment would recover his term without any notice to the tenant in possession; so that the courts of law, to remedy this inconvenience and injustice, made it a standing rule, that no plaintiff should proceed in ejectment to recover his lands against such a feigned ejector, without delivering the tenant in possession a declaration, and making him an ejector and proper defendant if he pleased.

This rule of court became absolutely necessary upon the alteration of the object of the action of ejectment, which was now *in rem*; for otherwise, the court would have been instrumental in doing an injury to a third person; because a declaration might otherwise be delivered to a stranger, a feigned defence be made, and a verdict, judgment, and execution thereon obtained, whereby the tenant would have been ousted, without notice of any proceedings against him.

Upon this notice to the tenant in possession, and affidavit thereof made, it was usual for the tenant in possession to move the court, that, as the title of the land belonged to him, he might defend the suit in the casual ejector's name; which the court, upon an affidavit of that matter, used to grant; and that the suit should be carried on in the casual ejector's name, the tenant in possession saving him harmless; and then the casual ejector was not permitted to release errors in prejudice of the tenant in possession, since the suit was carried on in his name by rule of court; and the process for costs was taken out against the casual ejector, who was obliged to resort to the tenant in possession to recover back the same, and put his bond of indemnification in suit upon his refusal to pay them. Styl. 468. 1 Keb. 705. 740. *Keys v. Bredon*.

Such leases were actually to be sealed and delivered, otherwise the plaintiff could maintain no title to the term; and were also obliged to be sealed on the land itself, otherwise it amounted to maintenance by the old law, to convey
a title

a title to any one, when the grantor himself was not in possession.

Such was the original method of proceeding in ejectment, when the term was first began to be recovered; but one alteration by degrees begat another, and fiction was heaped upon fiction. During the exile of king *Charles the Second* an entire new mode of proceeding in ejectment was invented, and introduced by Lord C. J. Rolle, and has been followed ever since by the court. It is therefore called the modern practice, in opposition to the ancient above described—a mere invention; but time and experience have proved it an invention for the advancement of justice. “In form,” says Lord Mansfield, “it appears as a trick between two, to dis-
“possess a third by a sham suit and judgment; an artifice
“which would be highly criminal, unless the court con-
“verted it into a fair trial between the proper parties.”

Introduction of
present modern
practice.

The new method of proceeding in an ejectment entirely depends on a string of legal fictions; no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant, but all are merely ideal, for the sole purpose of trying the title. To this end, in the proceedings, a lease for a term of years is stated to have been made by him who claims title, to the plaintiff, who is generally an ideal fictitious person, who has no existence. In this proceeding, which is the declaration, for there is no other process in this action, it is also stated, that the lessee, in consequence of the demise to him made, entered into the premises; and that the defendant, who is also now another ideal fictitious person, and who is called the casual ejector, afterwards entered thereon, and ousted the plaintiff; for which ouster the plaintiff brings this action. Under this declaration is written a notice, supposed to be written by this casual ejector, directed to the tenant in possession of the premises; in which notice the casual ejector informs the tenant of the action brought by the lessee, and assures him, that as he, the casual ejector, has no title at all to the premises, he shall make no defence; and therefore he advises the tenant to appear in court at a certain time, and defend his own title, otherwise he, the casual ejector, will suffer judgment to be had against him, by which the actual tenant will inevitably be turned out of possession.

Explanation
thereof.

The declaration is then served on the tenant in possession, with this friendly caution annexed to it, who has thus an opportunity of defending his title; which if he omits to do in a limited time; he is supposed to have no right at all; and, upon judgment being had against the casual ejector, the real tenant will be turned out of possession by the sheriff.

But

But if the tenant applies to be made a defendant, it is allowed him upon this condition, that he enter into a rule of court, to confess at the trial of the cause three of the four requisites for the maintenance of the plaintiff's action, viz. the lease of the lessor, the entry of the plaintiff, and the ouster by the tenant himself, who is now made defendant instead of the casual ejector; which requisites, as they are wholly fictitious, should the defendant put the plaintiff to prove, he must of course be nonsuited at the trial for want of evidence; but by such stipulated confession of lease, entry, and ouster, the trial will stand upon the merits of the title only.

Upon this rule being entered into, the declaration is now altered by inserting the name of the tenant instead of the fictitious name of the casual ejector; and the cause goes to trial under the name of the fictitious lessee on the demise of *A. B.* (the lessor or person claiming title) against *C. D.* (the now defendant), and therein the lessor is bound to make out his title to the premises, otherwise his nominal lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But if he makes out his title in a satisfactory manner, the judgment is given for the nominal plaintiff, and a writ of possession goes in his name to the sheriff to deliver possession. But if the now defendant fails to appear at the trial, and to confess lease, entry, and ouster, the nominal plaintiff must indeed be there nonsuited for want of proving these requisites; but judgment will nevertheless, in the end, be entered for him against the casual ejector; for the condition on which the tenant was admitted defendant is broken, and therefore the plaintiff is put again in the same situation as if he never had appeared at all; the consequence of which we have seen would have been, that judgment must pass for the plaintiff, and the tenant would have been turned out of possession. The same process, therefore, as would have been had, provided no conditional rule had been made, must now be pursued as soon as the condition is broken; but execution will be stayed, if any landlord, after the default of his tenant, applies to be made a defendant, and enters into the usual rule to confess lease, entry, and ouster.

Thus the practice of sealing leases upon the premises, and making an actual entry and ouster, are now dispensed with, a more easy and expeditious method is adopted, while the same substantial justice is done to the tenant in possession, and proper notice given him by the service of the declaration; nor is there any hardship in compelling the defendant to enter into the rule of court, to confess lease, entry, and ouster,

ouster, for they are mere formalities, and nothing to do with the merits of the case.

The great advantage, indeed, which has resulted from this fictitious mode is, that being wholly regulated by the court, it has from time to time been so modelled as to answer in the best manner every end of justice and convenience.

SECTION II.

Of the Proceedings in the Modern Action of Ejectment, and when it should be brought.

Having given a brief account of the origin of the present action of ejectment, and endeavoured to point out the distinction between the modern and ancient mode of proceeding, it may be proper to observe, that whenever the former method is adopted, it is necessary that there should be a tenant upon the premises, who may be served with notice of the declaration, and that in all cases where the premises are vacated and wholly deserted by the tenant, the party must resort to the old mode of proceeding, by sealing a lease upon the premises (except in such cases between landlord and tenant, as fall within the statute of 4 Geo. 2. which will be treated of hereafter).

Requisites in modern action.

When it may or may not be adopted.

Nor will the modern practice avail where the ejectment is brought to avoid a fine; for in such case it is necessary to prove an actual entry; the mere ordering a person to deliver a declaration in ejectment to the tenant in possession will not amount to such an entry; but in all other cases the confession of lease, entry, and ouster, by the common consent-rule, is sufficient.

By the 21 Ja. 1. c. 10. ejectment must be brought within twenty years after the title or right of entry accrued. Therefore if the lessor or plaintiff be not able to prove himself or his ancestors to have been in possession within twenty years before action brought, or to account for the want of it under some of the exceptions of the statute of limitations, he shall be nonsuited. And if a declaration in ejectment be delivered within twenty years, and a trial had, whereby there is lease, entry, and ouster confessed, yet if the plaintiff, being nonsuited in that action, bring another after twenty years, that will not be proof of an entry to bring it out of the statute; for it must be an actual entry. *Fairclaim dem. Empson v. Shackleton*, Cas. K. B. 573. Burr. 2604.

Of statute of limitations.

Twenty years adverse possession is a positive title to defendant. It is not merely a bar to the action or remedy of plaintiff, thereof.

plaintiff, but takes away his right of possession. *Taylor dem. Athyns v. Horde*, 1 Burr. 119.

What remedy if
statute attaches.

After twenty years want of possession therefore in plaintiff, or those under whom he claims, this possessory action of ejectment cannot be brought; but if there be any remedy, it must be by real action, as writ of right or the like.

Of limitation
when fine le-
vied.

And by 4 & 5 Ann. c. 16. s. 16. no claim or entry shall be of force to avoid a fine levied with proclamations, or shall be sufficient within the stat. 21 Ja. 1. of limitations, unless the action be commenced within one year after making such entry or claim. And the plaintiff must not lay his demise antecedent to his entry. 2 Str. 1086. *Berrington v. Parkhurst*.

How fine op-
erates.

By the 4 Hen. 7. c. 24. not only all parties and privies to a fine, and their heirs, but all strangers whatsoever, are bound by a fine duly levied and passed, after five years after proclamations made are passed, except feme covert, infants, prisoners, persons beyond sea, and such as are not of whole mind, who have five years allowed to them, after the death of their husbands, their attaining full age, recovering their liberty, returning to England, or being restored to their right mind.

(A) Of the Declaration and Notice, and of the Service thereof.

The proceedings in K. B. may be either by bill or original, but the latter are preferable, as no writ of error can be brought thereon except in parliament. In C. B. they are always by original.

The declaration and notice are the first process, no writ being previously sued out.

Prepare declaration upon treble *i. d.* stamp paper (the names of both plaintiff and defendant, who is the casual ejector, being fictitious); subscribe thereto a notice, directed to the real tenant in possession, for him to appear and defend his title to the premises, or else that the defendant (the casual ejector) will suffer judgment to be signed against him by default, and he (the tenant in possession) will be turned out of the premises. Serve an exact copy of this declaration and notice (upon the like treble *i. d.* stamp) on the tenant in possession. If there be several tenants, serve copy on each, but keep original declaration in your own possession.

If the premises lie in London or Middlesex, make the notice to appear on the first day of the next term to that of which the declaration is entitled; otherwise, if made generally, the tenant will have the whole of the next term to appear in.

But if the premises lie in any other county, the notice should be to appear the next term generally.

A copy of the declaration, and notice thereon, must be delivered personally to the tenant, (or his wife, if upon the premises or at her husband's house,) to whom, at the time of delivery, the notice should be read over, or the contents and meaning thereof explained.—But see the following

OBSERVATIONS:

Ejectment is a local action, the *venue* must be where the lands are situated. Ejectment local.

As it is a possessory remedy, the plaintiff must shew a right of possession as well as property. *Taylor dem. Atkins v. Horde*, 1 Burr. 119. What plaintiff must shew.

This right must exist at the time of making the pretended lease, mentioned in the declaration, otherwise how can it be supposed that he had a power to make such lease? It follows therefore, that the demise in the declaration must be laid after the title of the lessor of the plaintiff has actually accrued, or he will be nonsuited; and the commencement of the pretended lease should be laid precedent to the ejectment by defendant. 1 Sid. 8. *Goodtitle dem. Galloway v. Herbert*, 4 D. & E. 680. How demise must be as to time.

For the same reason where the ejectment is to avoid a fine, the demise must be laid subsequent to the actual entry, because it is only from the time of the entry that plaintiff has a right of possession. *Berrington v. Parkhurst*, 2 Str. 1086. *Oates dem. Wigfal v. Brydon*, 3 Burr. 1897. *Musgrave v. Shelby*, 1 Wil. 214.

The demise was laid on the effoin day of the term, plaintiff had a verdict; and in arrest of judgment it was said, that the effoin day is in law accounted the first day of term, and the demise being laid on that day, the ejectment was brought before plaintiff had a cause of action. But *per cur.* the action and the wrong may be on one and the same day; and this being by original, may be sued out after the commencement of the term, and returned; but admitting it to be a slip, the defendant should have taken advantage of it on *oyer*. 3 Salk. 8. *Rogers v. Mearshay*.

In ejectment, on the demise of an heir by descent, the demise was laid on the day his ancestor died, and held to be well enough. 3 Wil. 274. *Roe dem. Wrangham v. Hersey*.

So

So the declaration in ejectment must shew a good demise.

It must be a good demise so as to appear legal;

Thus if there be several lessors, and it is laid in the declaration that they demised, you must shew such a title in them, that they could demise the whole. Cro. Jac. 166.

as to the parties lessors.

If, therefore, lessors of plaintiff are tenants in common, there ought to be a different count on the demise of each tenant in common; or they may join in a lease (and if there are many it is the better way) to a third person; and that lessee make a lease to try the title; for if the only demise in the declaration be by several persons, and they prove to be tenants in common, it will be bad. 2 Wil. 232. *Heatherley dem. Worthington and Tunnudine v. Weston.*

But joint tenants are seized *per my & per tout*, that is, each has an undivided moiety of the whole; and therefore each may be said to demise the whole.

So of *coparceners*, for they stand on the same foundation; *vide* Bull. Ni. Pri. 107.; but tenants in common have separate and distinct estates, and there is no privity between them.

As to the mode by deed if necessary:

If it be necessary, either from the character of the party suing, or the nature of the thing claimed, that the lease should be by deed, the declaration should state a demise by deed; not that such a demise need be proved, for by the consent rule it is confessed, but the form of the declaration should accord with plaintiff's real title.

Thus in ejectment for tithes, which it is said can only be demised by deed. *Swadling v. Piers*, Cro. Jac. 613.

Or where a corporation aggregate was plaintiff. Carth. 390 *Patrick v. Ball*.

or by rent reserved.

Or where the lessor of plaintiff be an infant, in which case it used to be held, that the demise should be stated by deed, and also rendering rent.

But *qu.* if necessary?

But these authorities seem now greatly shaken, if not overthrown, by the cases of *Partridge and Ball*, Ld. Ray. 136. where C. J. Holt said the case of *Swadling v. Piers* was not law; and it was held (after verdict) that the demise by a corporation was good, though not by deed; and the cases in 2 Burr. 1806. and 2 D. & E. 161. which have settled that an infant may make a lease without rent to try his title.

So, upon the demise of a master and fellows of a college, dean and chapter of a cathedral, master or guardian of an hospital, parson, vicar, or other ecclesiastical person, of any lands, &c., the declaration should state, that there was a rent reserved, &c. pursuant to the statute 13 Eliz. c. 10. R. Sav. 129.

But *qu.* now?

It

It was formerly held, that if a demise was laid in the declaration for a longer term than the lessor had interest in the premises, the plaintiff could not recover, *per Hale*, Tr. 27 C. 2. But upon an objection made at *ni. pri.*, where the demise was laid for a longer term than the lessor had title; and 2 Leo. 140. Brown, 133. were cited in support of it, Lord Mansfield said, "There is nothing in the objection; for if the lessor have a title, though but for a week, he ought to recover; for the true question in ejectment is, Who has the possessory right? Suppose a person has an interest for three years only, and should make a lease for five, it would be good for the three years." Bull. Ni. Pri. 106. *Emerson v. Tuckbird*, 1 Ray. 728.

In case of a tenancy from year to year, as long as both parties please, if the tenant die intestate his administrator has the same interest in the land, which his intestate had. And the lessee of such an administrator may declare in an ejectment on a term for seven years, 3 D. & E. 13. *Doe dem. Shore v. Porter*.

In what cases errors in this respect are cured by a verdict. See *post*, (G)—(I).

To the declaration should be subscribed a notice directed to the real tenant in possession, desiring him to appear at the time mentioned therein, or judgment will go by default. Of the notice to declaration.

The notice should strictly be signed by the casual ejector's (which is the nominal defendant's) name. Bar. 172. *Peartable v. Troublefame*. How signed.

But it is now held good, though signed by the nominal plaintiff's name. *Harlewood v. Thatcher*, 3 D. & E. 351.

The notice in ejectment was to appear on the effoin day of the term, and held ill; for it should be to appear the first day in full term, which is the first day in term. Stra. 1049. *Holdfast v. Freeman*. At what day to appear.

Declaration good though served without prothonotary's name upon it. *Roe v. Doe*, *Holdfast v. Letgo*, Bar. 192, 193. No need of prothonotary's name to declaration.

All declarations in ejectment must be delivered before effoin day of every term. *Roe dem. Bird v. Doe*, Bar. 172. Of the delivery of declaration.

As the declaration is the first process in ejectment, and is to answer the end of a notice or warning to the tenant in possession, that proceedings are commenced against him to turn him out of his farm, common justice requires that he should be properly served with such process and acquainted with the meaning thereof. Reason of service of declaration.

The service of the declaration, therefore, should regularly be upon the tenant himself, and the notice should be read over and explained to him at the time. But a delivery to his Upon whom to be served.

his wife will do; 2 Blac. 800.; provided she be either on the premises, or at the husband's house. *Doe v. Baylis*, 6 D. & E. 765.

Tenant or his wife.
How if that cannot be effected.

Special circumstance must be mentioned to court.

When allowed as good service.

At what time motion to be made.

What service shall be deemed good.

Personal service upon the tenant is good any where. If the declaration be served upon the tenant or his wife as above, and defendant does not appear, an affidavit of such service may be made, and judgment signed as hereafter mentioned. But it often happens that such service cannot be effected; that the tenant is absent from home or secretes himself, or the like, and that the declaration is left with one of his family or his servant; in these cases, the circumstances should be mentioned to the court upon the motion for judgment against the casual ejector, and whenever it appears upon the affidavit that the tenant afterwards received the declaration, and that he knew the meaning thereof, the court will be satisfied in the first instance. But if the circumstances of the service are more special, and out of the common way, it is then necessary to move for a rule to shew cause why the service mentioned in the affidavit should not be deemed good service.

This motion may be made either after the service, or if the plaintiff is aware of the difficulties he shall meet with, he may state them, and move, prior to the service, that a service of such a nature should be sufficient. 1 Blac. 290. *Metbold v. Knight*; *Gulliver v. Wagstaff*, 1 Blac. 317.

It is needless to recite the various cases in which services, otherwise irregular, have, from peculiar circumstances, been rendered good by rules of court. This is merely a discretionary power in the court exercised according to the exigency of the case.

A tender of the declaration, and reading the notice aloud, though tenant refuses to receive it; or runs away and shuts the doors; or threatens with a gun to shoot the person serving it, if he came near: so throwing it in at the window; sticking it against the door; or leaving it at the house: upon the servants refusing to call their master, and the like, have, upon applications, been rendered good. Stra. 575. Bar. 173, 174. 176. 178. 180. 185. 188. 190. 192. *Sprightly v. Dunch*, 2 Burr. 1116.

So, a tender and reading notice aloud in the shop to the wife of tenant, who refused to receive it, is good. *Doe dem. Neale v. Roe*, 2 Wil. 263.

Service of a declaration in ejectment before the effoin day of the term on the daughter of the tenant in possession, in the absence of the tenant and his wife, is good; provided it appears that the daughter delivered it to the wife, though it should not appear that such delivery was before the effoin-

effoin day. *Smith dem. Ld. Stourton v. Hurst*, 1 H. Blac. 644.

The tenant was personated, at the time of the service, by another who accepted the service in the name of the tenant; and the court made a rule to shew cause, why it should not be deemed good service upon the tenant himself; and why judgment should not be signed against the casual ejector, on default of his appearing; and that leaving a copy of this rule at his house, with some person there, or if no one to be met with, affixing it on the door, should be good service thereof. Which rule was made absolute on a proper affidavit. 2 Burr. 1181. *Fenn dem. Tyrrel and another v. Denn.*

How if tenant personated;

On affidavit, that one of the tenants is a lunatic, and that one C. lives with her, transacts her business, and has the sole conduct thereof, and of her person, but would not permit the deponent to have access to her, in order to serve her with the declaration; whereupon he delivered it to the said C. and a rule was made for the lunatic and C. both to shew cause, why such service should not be good; and service of the rule on the said C. to be good. *Doe v. Roe, Barnes*, 190.

or a lunatic,

Of service on churchwardens

A declaration in ejectment served on the churchwardens and overseers of a parish, who rented a house for harbouring some of the parish poor, and did not otherwise occupy the house than by placing the poor in it, deemed sufficient service, and a rule made for judgment. *Turner dem. Mercer v. Doe, Barnes*, 181.

(B) Of Judgment against the casual Ejector.

(B)

When the declaration has been properly served, it is incumbent upon the tenant if he means to defend his possession to enter an appearance, or if he only holds under another, to give such landlord notice of the ejectment, who may, either with the tenant or in his stead, be admitted a defendant; but if no appearance is entered, either by the tenant or any other person interested, judgment may be signed against the casual ejector by default.

If no appearance, judgment by default.

And in order to compel an appearance, or to entitle himself to such judgment against the casual ejector, it is necessary for the plaintiff to proceed as follows:

Make affidavit of service of copy of declaration, as trouble 6d. sworn before judge or commissioner; annex affidavit to the original declaration in your own custody; give it to counsel with brief to move for judgment; if the service was in the common way upon the tenant or his wife, and the affidavit is regular, it is only a motion of course, signed and given

How to proceed to entitle plaintiff to such judgment.

in with the affidavit to clerk of rules in B. R., or secondary in C. B. But if service be out of the common way, the circumstances should be mentioned to the court, as before mentioned (A). Before making this motion, take a copy of the declaration, to make up the issue from, in case defendant should appear, and cause go on to trial.

Upon this motion a rule *nisi* (a) is granted, that unless tenant appear within the time mentioned in the rule, judgment shall be had.

Of the time for appearance and moving for judgment.

The time for making the motion, as also the time allowed for defendant's appearance, is governed by the locality of the premises, and the time mentioned in the notice when defendant is to appear.

K. B.

If a town cause.

If the premises lie in London or Middlesex, and notice in declaration be for tenant to appear on the first day or within the first four days of the next term, plaintiff should move on that day, or at furthest in the beginning of the term, and the tenant has but four days inclusive afterwards to appear in.

If moved late in term, court will not allow more than two or three days, but if not moved before the four last days of term, he has until two days before the effoin day of the subsequent term.

But if notice of declaration be to appear generally, tenant has the whole term to appear in.

If a country cause.

If the premises lie in any other county, though declaration be delivered before effoin day of Easter or Michaelmas term, with notice to plead in those terms, yet tenant has till four days exclusive of the day on which term ends, after the end

C. B.

If premises lie in London or Middlesex, and the tenant has notice to appear in the beginning of the term, the plaintiff cannot take any thing by his motion for judgment against the casual ejector for default of appearance: unless such motion be made within one week next after the first day of every Michaelmas and Easter terms, and within four days next after the first day of every Hilary and Trinity terms. R. T. 33 Car. 2.

N. B. This rule does not extend to the case of a vacant possession under 4 Geo. 2.

If premises lie in any other county, the practice is the same as in country causes in K. B.

(a) The rule for judgment against the casual ejector in K. B. is drawn out in the following manner:

Saturday next after eight days of the Purification of the Blessed Virgin Mary, in the thirty-fifth year of the reign of King George the Third;

Denn on the demise of Smith, Esq. against Eenn — Unless John Bull, the tenant in possession of the premises in question, shall appear, and plead to issue on Thursday next after the end of the term, let judgment be entered for the plaintiff against the now defendant Fenn, by default. And in the mean time proceedings to stay, upon the motion of Mr.

Let the rule be entered by the court.

end of the next issuable term, viz. Hilary or Trinity, to appear in; and if in a county where assizes are but once a year, till four days after the issuable term preceding such assizes.

In this court, judgment against the casual ejector must be moved for, the same term in which notice was to appear.

By R. Mich. 31 G. 3. the clerk of the rules is to keep a book, in which is to be entered all the rules which shall be delivered out in ejectments, instead of that formerly kept, which contained a list of the ejectments moved. The entry is to specify the number of the entry, the county in which the premises lie, the names of the nominal plaintiff, the first lessor of the plaintiff (with the words "and others" if more than one), and also the name of the casual ejector.

And unless the rule for judgment be drawn up, and taken away from the office of the clerk of the rules, within two days after the end of the term in which the ejectment shall be moved, no rule shall be drawn up or entered in the book, nor shall any proceedings be had in such ejectment.

It often happens that the affidavit of service of declaration is defective, in which case if the defects can be cured, a supplemental affidavit may be made, which take to clerk of rules, who will attend judge, and get an order to draw up rule.

If the tenant does not appear and plead within the time mentioned in the rule nisi, and which is allowed as above, no rule to plead need be given, but sign judgment against casual ejector as follows:

K. B.

Search the ejectment book at all the judges chambers for plea and rule; if none filed, get rule for judgment of clerk of rules, 5 s. make

C. B.

Search plea book at prothonotary's for plea and rule; if none filed, draw up rule for judgment with secondary; make an incipitur
H 2 9

In this court in country causes, plaintiff has the whole of the next issuable term, to move for judgment against the casual ejector, Runn Bj 166.

But in Imp. C. B. 652. a country ejectment may be moved any time in the term in which notice to appear is made, or on the last day of that term which is the same as in K. B.

Book of entry of rules to be kept.

Of supplemental affidavit.

How to sign judgment against casual ejector.

makes an incipitur of declaration on double 2s. 6d., and also on a roll; produce your rule for judgment, and clerk of judgments will sign it. Common bail must be filed for the casual ejector, R. M. 33 Car. 2.

As the rule only mentions common bail, there seems no occasion for appearance if proceedings by original. Imp. 551.

Make out writ of possession on 2s. 6d. stamp parchment; get it signed with signet of writs, and sealed.

Make præcipe for the writ of possession; get sheriff's warrant; give it to sheriff's officer, who will execute same by giving possession of the premises to the real plaintiff.

of declaration on double 2s. 6d. stamp paper, and on a roll of that term, make out warrant for defendant; get it signed at warrant of attorney's office, pay for signing 8d., if not above four defendants; if five, there must be two warrants; if nine, three, and so on. Carry papers to probonotary who will sign judgment, pay 12s. 8d.

Make out writ of possession, and get warrant thereon, as in K. B. (only no præcipe necessary.)

Affidavit of service must be certain.

That fiction upon which the proceedings in ejectment are founded, may not work injustice, and a person be turned out of possession without notice; the courts insist upon the affidavit of service, on which the motion for judgment is founded, being certain as to the person served, and that the tenant is tenant in possession. Barnard. 330. 429.

Affidavit of service on A. B. tenant in possession, or C. his wife, not sufficiently certain as to either. *Birkbeck v. Hughes*, Bar. 173.

So, of service on the wives of A. and B., who, or one of them, are tenants, not good. *Harding v. GreenSmith*, Bar. 174.

How if several tenants.

When several tenants have been served with copies of the declaration, if it is meant but as one ejectment, and to be followed by one judgment, one affidavit of the service of all is sufficient, annexed to the copy of one declaration; and in general in this case the names of all the tenants are prefixed to the several notices at the bottom of the declaration. But if the ejectments are made several, so as to have separate judgments, writs of possession, &c. then an affidavit must be annexed to separate copies of the ejectment of the service separately.

When, however, the ejectment was against several tenants, but in the several copies served the name of the individual tenant on whom the declaration was served was prefixed to the notice, instead of the names of all, so that the person making the affidavit

affidavit of service could not swear that the copy of any one declaration and notice was served on all the tenants. Yet the court thought one rule was sufficient on motion for judgment against the casual ejector. *Roe v. Roe*, 7 D. & E. 477.

Although judgment against the casual ejector be signed, yet if no possession is given, or trial lost, it may on an affidavit of merits and payment of costs be set aside. 1 Sal. 117. Str. 975.

When defendant will be let in after judgment by default.

What is a regular appearance, or such as will warrant plaintiff signing judgment by default, see *post* (C).

(C) Of the Appearance of the Tenant or Landlord, of the Statute 11 Geo. 2. and of the Consent Rule.

(C)

For the time when appearance should be entered see *ante* (B).

When any number of days are allowed, one is exclusive, and the other inclusive, and Sunday if the last is not reckoned; so that if by the rule, four days are allowed after term, and term ends on a Wednesday, tenant has all Monday to appear in. Say. 303.

Time of appearance how reckoned.

Though the declaration is to be served upon the tenant in possession, he being *prima facie* the person interested, yet in fact it often happens that some third person, under whom the tenant holds, is the real party whose title is impeached; and that the actual tenant in possession would be often indifferent about the event of the cause, or perhaps might even connive at the plaintiff's proceedings, and assist him in getting judgment, did not the legislature guard against such collusion.

Of stat. 11 G. 2. as to tenants giving notice to landlord of ejectment served.

To prevent any such fraud, all tenants are obliged by the statute 11 Geo. 2. c. 19. s. 12. to give notice to their landlords of a declaration in ejectment being delivered, under pain of forfeiting three years improved or rack rent of the premises so held and enjoyed by the tenant.

Of stat. 11 G. 2. as to landlords being made defendants.

And moreover as the tenant in possession could not be compelled to appear and enter into the common rule, to become defendant instead of the casual ejector; so neither could the landlord alone, without joining with the tenant, enter into such rule, and be made sole defendant. To remedy this inconvenience, by sect. 13. of the same statute, it is enacted, "That it may be lawful for the court, where
"such ejectment shall be brought, to suffer the landlord to
"make himself defendant, by joining with the tenant, in
"case he should appear; but in case such tenant shall neglect or refuse to appear, judgment shall be signed against
"the casual ejector, for want of such appearance: but if

" the landlord, &c. of any part of the lands, &c. for which
 " such ejectment was brought, shall desire to appear by him-
 " self, and consent to enter into the like rule, that by the
 " course of the court, the tenant in possession, in case he
 " or she had appeared, ought to have done; then the court,
 " where such ejectment shall be brought, shall and may
 " permit such landlord so to do; and order a stay of exe-
 " cution upon such judgment, against the casual ejector,
 " until they shall make further order therein."

By whom ap-
 pearance may
 be.

The appearance therefore may be either by the tenant himself, (as when he is in possession of his own estate, or agrees with his landlord to defend the action, or it is an ejectment by the landlord against his tenant, or the like,) or it may be by the tenant and the landlord jointly, or if the tenant refuses, it may be by the landlord alone.

How appear-
 ance effected.

The appearance in all the above cases is effected in the same manner, except only that in the two last counsel's signature must be got to a motion; which is a motion of course to admit the landlord to defend, either with the tenant or by himself if he refuses to appear, and a rule got from clerk of rules accordingly. Also, if tenant does refuse to appear, an affidavit of such refusal should be made.

How to appear.

If the tenant or landlord or both appear, get a blank consent rule from a stationer, unstamped, or from the secondary in C. B. then fill it up, making the tenant or landlord defendant, or both as case may be, instead of the casual ejector, intisling the cause in the margin, and inserting the premises, as described in the declaration, or such part thereof as the party would wish to defend; then the attorney for the defendant signs his name at the bottom, leaving a blank space for the plaintiff's attorney to do the like [for this is rather an agreement between the parties, than the rule itself, which is drawn out by the officer], and engrosses the general issue on stamped paper, and afterwards annexes the same to the rule [and if there is a rule to admit the landlord defendant, either with the tenant or by himself, the tenant having refused, annex that also]; then file common bail, if by bill in B. R. with the clerk of the common bails; and if by original in B. R. enter the appearance with the filazer, who will mark it; or if in C. B. enter appearance with the proper filazer, who will stamp the rule; which being done there, if the proceedings are in B. R. you carry and leave this rule, &c. at any of the judges' chambers; or if in C. B. you carry and leave the same with the prothonotary.

The form of the consent rule in B. R. is as follows:

Michaelmas term, in the 36th year of King George the Third.

Middlesex. Denn, on the demise of Smith, of four messuages, four barns, four stables, fifty acres of land, fifty acres of arable, fifty acres of pasture, twenty acres of wood, and twenty acres of underwood, with the appurtenances, situate in the parish of St. Mary, Islington, in the county of Middlesex.

It is ordered, by consent of the attornies of both parties, that John Bull [the tenant or landlord, as the case is] be made defendant, in the stead of the now defendant Richard Fenn, and do appear forthwith at the suit of the plaintiff, and *file common bail* [if by original, leave out these words], and receive a declaration in an action of trespass and ejectment, for the premises in question in this cause, and forthwith plead thereto, not guilty; and upon the trial of the issue, confess lease, entry, and ouster (a), and insist upon the title only; otherwise, let judgment be entered for the plaintiff, against the now defendant Richard Fenn, by default; and if, upon the trial of the issue, the said John Bull shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his bill [or if by original, his writ] against the said John Bull, then no costs shall be allowed for not prosecuting the same; but the said John Bull shall pay costs to the plaintiff in that case to be taxed. And it is further ordered, that if, upon the trial of the said issue, a verdict should be given for the said John Bull, or it shall happen that the plaintiff shall not further prosecute his said bill [or writ], for any other cause than for not confessing lease, entry, and ouster, then the lessor of the plaintiff shall pay to the said John Bull his costs in that behalf to be adjudged.

By the court.

O. P. for the lessor of the plaintiff.

I. M. for the defendant.

For the construction of the above rule see *post*. (C. 3).

(a) In the Common Pleas the consent rule is different, for there the following words are inserted:—"of so much of the tenements specified in the plaintiff's declaration as are in the possession of the said defendant or his tenant, or any person claiming by or under his title, or that in default thereof judgment shall be entered," &c. 1; but see *post*. (C. 3).

How to appear for Part.

Formerly the rule used to be drawn generally, that A. B. be admitted, for so much of the premises as are in his or his undertenants' possession, and plaintiff was obliged to distinguish by proof what premises were in each tenant's possession; or it specially described the premises defended; at the discretion of defendant. This occasioned the rule of Trin. 15 Car. 2. whereby defendant's attorney was ordered to give plaintiff's attorney notice of the tenements he defended for.

But now the practice is to insert in the margin of the consent rule the premises to be defended, saying, that they are part of the premises mentioned in the declaration, which makes the rule special, and thereby supercedes the necessity of plaintiff's proving, in whose possession the lands are.

When the appearance is for part, the plaintiff may sign his judgment against the casual ejector for the residue.

But that the lessor of the plaintiff may the better know what exact part of the premises are defended, the defendant's attorney should give notice to plaintiff's attorney what the premises are. Thus,

In the King's Bench, { Denn, on the demise of Smith
or Common Pleas. { against
Fenn.

Sir,

Take notice, that I defend for a messuage or tenement, a garden and stable [specifying the particular premises], situate in the parish of St. Mary, Islington, now in the possession of the said John Bull, or his undertenant.

Dated this day of 1796.

Yours, &c.

I. M. defendant's attorney.

To Mr. O. P. plaintiff's attorney.

OBSERVATIONS.

(C. 1) Of the Construction of Statute 11 Geo. 2.

(C. 2) Of the Appearance and Plea, and when regular or not.

(C. 3) Of the Effect and Operation of Consent Rule.

(C. 1)

(C. 1) **Of the Construction and Operation of Stat.**
11 Geo. 2.

(C. 1)

The two sections of this statute which chiefly relate to the present subject are the 12th and 13th.

The 12th section compels tenants to give notice to their landlords of ejectments served upon them. This only extends to cases where ejectments are brought inconsistent with the landlord's title.

In what cases tenants must give notice of ejectment to their landlords.

It does not attach therefore upon the tenant of a mortgagor, who omits to give him notice of an ejectment brought by the mortgagee, in order to enforce an attornment. *Bushley v. Bushley*, 1 D. & E. 647.

The 13th section enables the landlord to be made defendant either with the tenant, or in his stead, if he refuses to appear.

Of the landlord being made defendant.

Before the passing of this act, as appears clearly by what Mr. Justice Wilmot and Lord Mansfield said in *Fowler v. Shantille*, 3 Burr. 1290. it was the practice to admit the landlord and the tenant in possession co-defendants. C. J. Holt said (Salk. 257. 7 Mod. 70.), it was due of right to the landlord to be made defendant; and all those who stood behind the tenant in possession were entitled to come in and be received *pro interesse suo*, to defend the possession. The landlord used also to defend alone.

How the practice was before the statute.

But by the case of *Goodright v. Hart*, Str. 830. the former practice as well as decisions were not attended to, the court refused to let in persons who stood behind the tenant in possession to defend, instead of the tenant. This was a case, said Lord Mansfield, very little considered, but it certainly occasioned the clause in the act of parliament relative to this subject. Every reason of private justice and public convenience, and every authority was the other way.

What occasioned the act.

In fact therefore this statute rather established an old right, than created a new one.

Its effect.

Yet we find, that immediately after the passing of this act, a limited and narrow construction was endeavoured to be put upon it.

How at first construed.

In the case of *Roe dem. Leake v. Doe*, Bar. 193. where the lessors of plaintiff claimed title as devisees under one will, and A. B. and C. D. claimed title under another will, and upon the tenant refusing to appear, applied to be admitted defendants; the court refused, saying, this motion is founded on the act 11 Geo. 2., and that they had no jurisdiction to admit any person to defend an ejectment instead

As confining the jurisdiction of the court.

of the tenant, except the landlord only. And who is landlord within the act? Not every person claiming title, but one who is in some degree of possession, as receiving rent, &c.

So a mortgagee, who had never received the rent, was refused to be admitted. *Jones v. Williams*, Tr. 15 Geo. 2.

When a different construction began to prevail.

But Lord Mansfield, in *Fairclay v. Shantille*, said, he did not understand the note in Barnes. "It puts," says he, "the refusal of the motion upon want of jurisdiction; where-
"as in ejectment the court can never want jurisdiction to
"prevent the plaintiff from recovering without a proper
"trial. An ejectment is the creature of Westminster Hall,
"introduced within time of memory, and moulded gradually into a course of practice by rules of the court. The
"same authority which brought it thus far, may certainly
"carry it to a higher degree of perfection, as experience
"points out either inconveniences or defects. The act of
"11 Geo. 2. was drawn and brought in by Sir John Strange;
"the provisions therein relative to proceedings in ejectment,
"were either to enforce a right practice or occasioned by
"some case contrary to the general sense of the bar, which
"the legislature virtually condemns as erroneous. In Stra.
"1241. there is not a syllable about a mortgagee being refused to be admitted to defend as landlord."

The true spirit of the statute.
The word landlord extended to all.

He then proceeds in the same case to consider the question upon a truly liberal ground. There are two matters, says he, to be considered, 1st, whether the term "landlord" ought not, as to this purpose, to extend to every person whose title is connected to, and consistent with, the possession of the occupier, and divested or disturbed by any claim adverse to such possession; as in the case of remainders or reversions expectant upon particular estates? 2dly, Whether it does not extend as between two persons claiming to be landlords *de jure* in right of representation to a landlord *de facto*, so as to prevent either from recovering by collusion with the occupier, without a fair trial with the other? Where a person claims in opposition to the title of tenant in possession, he can in no light be considered as landlord, and it would be unjust to the tenant to make him a co-defendant; their defences might clash. Whereas, when there is a privity between them, the defence must be upon the same bottom, and letting in the person behind can only operate to prevent collusion.

Claiming title consistent with the possession of the occupier.

But not in opposition thereto.

An interest in the land sufficient.

And afterwards, at another time, he said, when a person applies to be made defendant in the room of the tenant, it is not necessary that he should be the actual landlord; it is sufficient if he have only an interest in the lands: it should seem

seem therefore, that a mortgagee out of possession may be admitted to defend on the tenant's refusal. *Runn. Eject.* 181. (edit. 1795.)

Thus the statute of 11 Geo. 2. received a construction agreeable to its true spirit; and which seems to have been since adopted by the present chief justice. The above construction now prevails.

For in the case of *Lovelock v. Doncaster*, 3 D. & E. 783. 4 D. & E. 122. upon a rule why *cestui que trust* should not be admitted to defend, being opposed on the ground that they had never been in possession, and could not be considered as landlords; Lord Kenyon said—If the person requiring to be made a defendant under the act, had stood in the situation of immediate heir to the person last seised, or had been in the relation of remainder-man, under the same title as the original landlord, I am of opinion, he might have been permitted to defend as a landlord, by virtue of the directions of the statute—but here the very question in dispute between the adverse party and himself, is, whether he is entitled to be a landlord or not? and therefore we are not authorised to extend the proviso of the statute to such a case as this. Extends to the heir or remainder-man.
Not to *cestui que trust*.

But the court permitted a devisee in trust to defend as landlord. *Norris v. Doncaster*, 4 D. & E. 122. But to a devisee in trust.

So, the heir at law or remainder-man under the same title. *Ibid.*

So, an heir who had never been in possession. 1 *Doe dem. Thistlethwaite v. Roe*, 4 D. & E. 122.

If ejectment is brought by one claiming as heir of a copyhold, and the lord of a manor who claims by escheat *pro defectu hæredis*, applies to be admitted defendant, either with the tenant or alone, the court will direct the lord to bring ejectment against the heir, and the heir be admitted to defend. If the lord refuses, they will discharge his rule to be admitted; if the heir refuses, they will admit the lord to defend. *Fairclaim v. Shamittle*, 3 Burr. 1290. How if heir of a copyhold brings ejectment, and lord of manor claiming by escheat, wishes to defend.

In ejectment for a chapel, the parson can only defend for a right to enter and perform divine service, Str. 914. *Martin v. Davis*; though before held otherwise. *Hillingworth v. Brewster*, Sal. 256. How a parson may defend for a chapel.

The court will never suffer a lessee to defend alone against his landlord, or those claiming under him on a supposed defect of title. *Driver dem. Oxendon v. Lawrence*, 2 Blac. 1259. Lessee cannot defend alone against his landlord.

Where landlord is permitted to defend without the tenant, judgment is always first signed against the casual ejector; the reason of which is, that under it, the plaintiff, if he obtain a verdict, may get possession of the premises sued for, which When landlord defends alone instead of tenant, judgment must be signed against casual ejector.

which he could not do by virtue of a judgment against a person out of possession.

Why.

On motion for the landlord to defend upon the statute of 11 Geo. 2. the court objected, that this motion could not properly be made till after judgment signed against the casual ejector; and that an affidavit ought to be produced of the tenant's refusal or neglect to appear. To which it was answered, that after judgment signed against the casual ejector, the plaintiff might take possession. But the court held the affidavit to be necessary, and made no rule; declaring, that the intent of signing judgment against the casual ejector was only that the plaintiff, after having tried his cause against the landlord (the tenant not being a party), might have the benefit of his verdict, and take possession under the judgment, which, under such verdict, he could not. It seems reasonable (upon a proper affidavit) to grant a rule to shew cause, before judgment against the casual ejector can be signed, to prevent the ill consequences of taking possession immediately after. *Barnes, 179. Bigland v. Dobson.*

Landlord let in after judgment when signed from tenants not giving notice,

If upon an ejectment brought the tenant does not give notice to his landlord, but suffers judgment by default, the landlord, upon application to the court, will be permitted, notwithstanding judgment regularly signed, to come in and be made defendant, and the tenant for his neglect will be compelled to pay the lessor of plaintiff all the costs incurred. *Troughson v. Roe, Burr. 1996.*

How to proceed if a material witness be made defendant.

If a material witness for defendant be also made a defendant, the right way is for him to let judgment go by default; but if he pleads, and by that means admit himself tenant in possession, the court will not afterwards, upon motion, strike out his name. But in such case, if he consent to let a verdict be given against him, for as much as he is proved to be in possession of, I see no reason why he should not be a witness for another defendant. *Bull. Ni. Pri. 98.*

(C. 2)

(C. 2) Of the Appearance and Plea; and when regular or not.

Tenant not obliged to appear.

A tenant is not obliged to appear in ejectment, though the landlord is ready to indemnify him. *Bar. 173.* Nor can an attorney, by order of the landlord, appear for the tenant. *Bar. 39. 178.* But such appearance and plea would be irregular, and ordered to be withdrawn.

Of what term appearance should be entered.

The appearance in ejectment should be entered of the term mentioned in the notice. And where the notice to appear was in Hilary, and the tenant entered an appearance in

Michaelmas

Michaelmas following, and did nothing farther, and plaintiff, finding no appearance of Hilary, and no common rule entered into or pleaded, signed judgment against the casual ejector, the court held it regular; but afterwards set it aside to try the merits. Barnes, 250. *Mason dem. Kendall v. Hodgson*.

The tenants had the forenoon of the 29th of April in Easter term to appear in. F. the landlord, moved to add himself to the tenants; but no appearance being entered, plaintiff, on the 30th, signed judgment against the casual ejector. The landlord afterwards, without disclosing to the court what had been previously done, applied for the conditional rule as a matter of course: and by virtue thereof, on the 1st of May, appeared alone without the tenants. Plaintiff moved to take out execution on the judgment, and on shewing cause, the judgment appeared to be regular, and the appearance out of time. Plaintiff offered to waive his judgment, if the landlord, who resided at Jamaica, would give security for costs; to which his counsel not consenting, the court made the rule absolute for leave to take out execution. Barnes, 186. *Roe dem. Hyde v. Doe*.

In C. B. the plea of *Marshall and others*, landladies and tenants in possession, who had appeared with the filazer, and entered into the common rule, was left in the prothonotary's office, intitled with the true name of the cause; but by mistake in the body of the plea, the name of plaintiff's lessor was inserted (as the person complaining) instead of that of the nominal plaintiff. Plaintiff's attorney looking upon this plea as null and void, signed judgment against the casual ejector; which judgment was set aside, with costs, as irregular: the plea is properly intitled, and not a nullity. Barnes, 191. *Goodtitle dem. Gardner v. Badtitle*.

In C. B. the agents for the tenants in possession entered their appearance with the filazer, and sent a note to plaintiff's agent that defendants plead not guilty. Plaintiff's agent signed judgment for want of a plea in form. The counsel for the tenants submitted to the court, that according to the words of the rule for judgment against the casual ejector, unless the tenants appear, a new declaration against the tenants should in strictness have been delivered before a plea in form could be required. Judgment set aside, with costs. Barnes, 270. *Goodtitle dem. Brymer v. Notitle*.

The common practice of the court is, to receive motions for judgment against the casual ejector, *nisi*, &c. after the term is ended; and then, upon the common rule, the new defendant has no opportunity to plead to the jurisdiction, or to move for leave so to do. But the court, on motion, will give

If judgment signed, it is too late for landlord to be made defendant.

Mistake in plea of plaintiff's name not sufficient to entitle him to judgment.

What in form does not amount to a plea.

Of pleading to the jurisdiction.

give leave to plead to the jurisdiction in ejectment. But *Q.* if the motion ought not to be, "That the tenant in possession, when made defendant, may have leave," &c. *Vide* 1 Blac. Rep. 197.

Of plea of ancient demesne.

Ancient *demesne* has always been held a good plea in ejectment. But application to plead it must be made within the four days. *Vide* Barnes, 187. 194. It ought to be pleaded in the first four days. *Ibid.* 331.

And there must be an affidavit, that the lands are holden of a manor, which manor is ancient *demesne*, that there is a court of ancient *demesne* regularly holden, and that lessor plaintiff has a freehold. *Dor dem. Russ v. Ros*, 2 Burr. 1046, and *vide* Tidd, 326. *Hitch v. Cannon*, 3 Will. 51., *contra*. *Vide* *Goodright v. Shuffel*, 2 Ray. 1418.

Of fine and non-claim of accord.

So, a fine and non-claim, or an accord and satisfaction, is a good title.

General issue now the usual plea.

But such pleas, whether in bar or in abatement, are now seldom pleaded; for the defendant, if he appears, is generally bound by the consent rule to plead the general issue not guilty.

(C. 3)

(C. 3) Of the Consent Rule, its Operation, &c.

Consent rule.

The origin and meaning of the consent rule has been already shewn, *ante* Section i, and the form thereof, *ante* C. p. 103.

Its effect.

The effect of the rule is to bring the matter to the mere question of the plaintiff's possessory title.

By it, the defendant undertakes to plead not guilty, and to confess upon trial, lease, entry, and ouster, and to insist upon the title only.

When sufficient to take away proof of entry.

In all cases except that of an ejectment brought to avoid a fine, (where there must be an actual entry, by a positive rule of law, and by the stat. 4 Ann. c. 16. s. 16.) the confession of lease, entry, and ouster is sufficient to bar a non-suit for want of proof of actual ouster. It is sufficient therefore for an ejectment brought upon condition broken, *Hare v. Cator*, Doug. 483.; or in the case of an ejectment by one tenant in common against another. *Wigfall v. Brydon*, 3 Burr. 1895.

Not to avoid a fine.

But it is in ejectment for forfeiture;

or by one tenant in common against another.

Qu. as to statute of limitations.

But *Q.* whether sufficient to prevent the operation of statute of limitations, or to enable a person who has recovered in ejectment, to maintain trespass for the *mesne* profits against one, who was occupier when the title accrued, but not at the time of the ejectment. Doug. 12. 485. Runn. Eject. 262. (edit. 1795.)

As

As in the case of tenants in common, there is no occasion to prove actual entry and ouster, if defendant enters into the common rule as it is thereby confessed; if the fact be, that there has been no actual ouster, the defendant ought to apply to the court not to compel him to confess, or to permit him to do it specially; which the court will grant, where it is only matter of account, and the only ouster is by pernancy of the profits, without an actual obstruction of the other to occupy. 3 Burr. 1895.

So as to tenants in common.

But where he disputes the title, he shall be compelled to confess. 7 Mod. 39.

If they dispute the title.

The landlord had applied to be made a defendant, and had entered into the common rule; but the lessor of plaintiff had not joined in the consent rule; and on motion to set aside a rule to reply (as he could not be forced to proceed against a person whom he had never accepted as defendant) the court held the rule to be regular, and that the nominal plaintiff might be *non-prossed* thereby; but being nominal, the defendant could have no costs. 2 Blac. Rep. 763. *Goodright* dem. *Ward v. Badtitle*.

How if plaintiff does not join in rule with landlord.

The common rule being made by assent of both parties, an attachment lies for the non-performance of it, as of all other rules of court that are disobeyed, and this is all the remedy which the parties on both sides have for their costs. Sal. 259. Runn. Eject. 202.

How rule to be enforced by attachment.

Though the defendant confesses lease, entry, and ouster, yet some have said, he may deny being in possession of the premises, for which the plaintiff contends, and put him to prove it, which if he cannot, he must be nonsuited. So, in the case of *Smith v. Mann*, 1 Will. 220., where the landlord had been made defendant instead of the tenant, it was decided that the plaintiff must prove the tenant in possession; for the defendant does not by entering into the rule confess himself to be landlord of any premises, but of such as were in possession of his tenant. These positions may be disputable, unless in cases where there were several tenants, for it has been said (*Jesse v. Bacchus*, Sitt. K. B. Mich. 30 G. 2.), that if there be but one tenant defendant, the plaintiff need not prove him in possession; because if he be not, why did he enter into the rule. Runn. Eject. 292. (edit. 1795.)

Whether defendant can put plaintiff to proof of tenant's possession.

This was for some time *uxata questio*, but at length it has been determined, that the lessor of the plaintiff is bound at the trial to prove the defendant in possession of the premises, which he seeks to recover, if the defendant contests his possession, notwithstanding he has entered into the rule to confess lease, entry, and ouster. And this is now the practice in both courts. *Goodright v. Rich*, 7 D. & E. 327.

(D) Of

(D) (D) Of the Proceedings from Appearance to Trial.

How to search
for plea.

To proceed on
consent rule;

and make up
issue, record,
&c. for trial.

When the rule for judgment against the casual ejector is out, that is to say, when the time for appearance is out, the plaintiff's attorney must search at the chambers of the respective judges in B. R. for the defendant's plea (in case he has appeared) and consent rule. To which, after the judge with whom it was left has signed it, and the plaintiff's attorney given a receipt for the same, he signs his name over the defendant's attorney, and then carries it to the clerk of rules, who files it, and draws up the consent rule from it on stamp, of which rule the plaintiff's attorney makes a copy, and annexes the same to the issue, which is made up and delivered to the defendant's attorney for trial. But in C. B. when the defendant has appeared, and left the consent rule in the prothonotary's office, the plaintiff's attorney resorts there for it; and having signed his name over that of the defendant's attorney, he gets two rules from it, drawn up by the secondary on stamps, one for each party, and then the plaintiff's attorney makes up the issue, and delivers a copy thereof, with notice of trial, on the defendant's attorney, and proceeds to trial as in other cases.

The issue is made up with the same memorandums, if proceedings by bill, and without any memorandum, if by original; as in other cases, so is the record; and the same time allowed for notice of trial, and if plaintiff obtain a verdict, costs are taxed, and judgment entered up, and execution sued out, as in common actions; for which, under the different heads, see Vol. I.

Issue must agree
with declara-
tion.

In making up the issue, it must agree with declaration as first delivered, except in defendant's name; unless an order for that purpose. *Ld. Ray, 1411. Bass v. Bradford.*

How if they
differ.

And in case they should differ, defendant may obtain a rule, that the issue should be made according to the declaration delivered against the casual ejector. *Ibid.*

Of payment of
issue money.

If defendants when they had appeared, did not pay the issue money, judgment used to be signed against them, but not against the casual ejector. *Bar. 253. Sawell v. Jolly.*

But now by the late rule it seems no such judgment is allowed. See Ch. XIV.

(E)

(E) Of the Trial and its Incidents.

(E. 1) If Plaintiff has entered into Part of the Premises before Trial.

(E. 2) In

(E. 2) In case of the Death of either Party.

(E. 3) If there is a Variance between Issue and Record.

(E. 4) If Defendant does not appear and confess.

(E. 5) If several Defendants, and some only appear.

(E. 6) If Verdict for Lessor of Plaintiff.

(E. 7) If Verdict for Defendant.

(E. 1) If Plaintiff has entered into Part of Premises before Trial.

(E. 1)

If the plaintiff after issue and before trial enters into part of the premises, the defendant at the assizes may plead it as a plea *puis darrein continuance*. *Moore v. Hawkins*, Yelv. 180. Cro. Car. 261. Nor is it in the direction of the judge to reject it or not; he is bound to receive it, it is made part of the record, and the trial is stopped, for the plaintiff cannot reply to it at the assizes. *Level v. Eastaff*, 3 D. & E. 554. 2 Will. 137.

Of pleading
puis darrein
continuance, if
plaintiff entered
into part.

(E. 2) In case either Party die.

(E. 2)

The plaintiff has a right to proceed, both for the possession and the trespass; and therefore the death of the lessor (though only tenant for life) is no abatement; nor can it be pleaded *puis darrein continuance*, because the right is supposed in the lessee. Hob. 5. But if the plaintiff, in such case, insist to go on, the court will oblige him to give security for payment of the costs, in case judgment go against him. *Thrustout dem. Turner v. Grey and another*, Str. 1056.

Of the death of
plaintiff.

But if in such case plaintiff is nonsuited for want of defendant's appearing and confessing, the executor of lessor shall have no costs taxed on the common rule. *Thrustout v. Bedwell*, 3 Will. 7.

If when there are several defendants, one dies after issue joined and before verdict, the death should be suggested on the roll before trial, and a *venire* awarded to try the issues between the survivors. *Far v. Denn*, 1 Bur. 363.

Of death of de-
fendant after
issue and before
verdict:

Though when the *venire* was awarded against both, and the verdict was against both, yet, upon suggesting the death of the one upon the roll after verdict, plaintiff had judgment for the whole against the other. *Ld. Ray*. 717. See also the above case of *Far v. Denn*.

After verdict.

If either party die after the commencement of the assizes, though before trial, it is within the statute 17 Car. 2. c. 8. made perpetual by 1 Jac. 2. c. 17. s. 5. whereby it is enacted, "That in all actions personal, real, or mixed, the death of either party between the verdict and judgment, shall not be alleged for error, so as such judgment be entered within two terms after such verdict."

If judgment be signed, though it be not entered on the roll within two terms after verdict, it is sufficient. Sal. 8. Sid. 385.

And if after verdict, and before judgment, any motion is made, and argument takes place, and *pendente questione* the defendant dies, court on motion will give plaintiff leave to enter up judgment as of next term after verdict, *nunc pro tunc*. *Tooker v. Duke of Beaufort*, 1 Burr. 146.

(E. 3) (E. 3) If there be a Variance between Issue and Record.

How to proceed if variance between issue and record.

If there be any material variance between the issue and record, defendant should still appear at the trial, and afterwards move the court to set aside the verdict for the variance. For if he does not appear and suffer plaintiff to be nonsuited for want of his confessing, he is out of court and cannot properly afterwards move to set aside the nonsuit; though upon such motion the court did on *payment of costs* grant the rule, *Jones dem. Thomas v. Hengest*, Bar. 175.; and in another case itay the proceedings. *Law v. Wallis*, Barnard. 156.

(E. 4) (E. 4) If Defendant does not appear and confess.

Consequence of defendant's not appearing and confessing.

If upon the trial the defendant does not appear, and confess lease, entry, and ouster, agreeable to the rule of court, which he has entered into, the plaintiff must necessarily be nonsuited; but as it is owing to the defendant's disobedience to the rule of court, the reason of such nonsuit is specially indorsed on the *posse*, and it ultimately operates with respect to the plaintiff, as if, in the first instance, he had got judgment against the casual ejector by defendant's not appearing; and with respect to the defendant he is saddled with the extra costs.

How to proceed in such case at the trial.

The course at the trial in such case is, to call the defendant to confess, and his attorney, if he be within the rule; and then to call the plaintiff and nonsuit him, and pray to have it indorsed on the *posse*, that the nonsuit was for not confessing lease, entry, and ouster. If the cause is in the

K. B.,

K. B., you must wait till the day in bank (which is the first day of the next term if a country cause,) before you sign judgment; then sign judgment against the casual ejector on a double half-crown stamp paper, as if there had been no appearance. But if in C. B., judgment may be signed immediately after trial before the day in bank, and writ of possession may be sued out; but the costs cannot be taxed till first day of term. Carry the judgment paper and consent rule with the *possea* to the Master, or prothonotary; neither the rule nor *possea* need be stamped with a double half-crown; costs will be taxed upon the rule; then make a copy thereof, serve defendant therewith, at same time shewing him original rule, and demand the costs, which if not paid to lessor of plaintiff, he may on affidavit move for attachment.

How afterwards
in getting judgment.

Sue out execution of *habere facias possessionem* directed to sheriff of proper county, who will deliver possession of premises. See *post.* (H). Of suing out execution.

The same mode of proceeding is to be observed, whether the tenant himself defended, or landlord entered into the rule and was admitted in his stead; and the motion for judgment against the casual ejector on such a nonsuit, is absolute in the first instance. *Styles v. Oakes*, Bar. 182. *Fenn v. Marriott*, Bar. 185.

Motion for judgment absolute in first instance.

It is observable that the two courts materially differ in their practice in this respect. In the King's Bench, judgment cannot be signed, nor execution taken out after a nonsuit for not confessing, until the day in bank, when the *possea* is returned. *Doe v. Copeland*, 4 D. & E. 779. Whereas, in the Common Pleas, the lessor of plaintiff is entitled to judgment and execution immediately. *Fairfax v. Bentley*, Hil. 27 Geo. 3. So that if an ejectment come to trial in any sittings after Trinity term, and defendant does not appear to confess, the lessor of the plaintiff may get possession of his estate above four months sooner, if his action be in the Common Pleas, than he could have done if it were in the King's Bench.

Difference of practice in the two courts in this respect.

(E. 5) If several Defendants, and some only appear.

(E. 5)

If there be several defendants, and some of them do not appear and confess, the practice now is, to proceed against those who do appear, and to enter a verdict for those who do not appear, indorsing upon the *possea*, that such verdict is so entered for them, because they do not confess; upon which the lessor of the plaintiff as to them is entitled to judgment against the casual ejector; and to have execution

How to proceed if some of defendants only appear.

as to those lands which were in the possession of those who did not confess. *Ld. Ray. 729. Bull. Ni. Pri. 98.*

Verdict against defendant A., who on the trial appeared, and confessed lease, entry, and ouster; the other defendants did not appear and confess; thereupon they, according to the usual practice in such case, were found not guilty. Plaintiff obtained leave to sue out an *habere facias possessionem* on the judgment against the casual ejector as to them, and got his costs taxed on the *posse*; for which costs he thereby could only have remedy against defendant A. He then moved that the prothonotary should tax his costs against B. (one of defendants who did not appear and confess,) on the common rule, by consent entered into for him, whereon a rule was first made to shew cause, and afterwards absolute. *Barnes, 149. Thrushout dem. Wilson v. Foote.*

Defendant at the trial did not appear to confess, &c.; a nonsuit happened; and afterwards the plaintiff's lessor, instead of taking his remedy for the costs taxed upon the common rule as he ought to have done, entered judgment against the casual ejector, sued out a *fi. fa.* against the defendant's goods, and levied his costs thereon, acting as special bailiff himself. An action being brought for this irregular levy in B. R., the defendant moved in C. B. to set aside the *fi. fa.*, and the court ordered restitution to be made, and the defendant's costs to be paid by the lessor and his attorney; and by consent the action in B. R. to be discontinued without costs, and no other action brought. *Barnes, 182. Goodright dem. Rowell v. Vice.*

(E. 6)

(E. 6) If Verdict for Lessor of Plaintiff.

How to proceed
if verdict for
plaintiff.

If there be a verdict for plaintiff, tax costs and sign final judgment as in common cases, allowing four days for motion for new trial, or arrest of judgment; he may then have a *ca. fa.* or *fi. fa.* for the costs, and a writ of *habere facias possessionem* afterwards, or a writ of *habere facias possessionem* and *fi. fa.* together in one writ.

(E. 7)

(E. 7) If Verdict for Defendant.

How if verdict
for defendant.

If a verdict is given for the defendant, or the plaintiff is nonsuited for any other cause than for the defendant's not confessing lease, entry, and ouster, the defendant must proceed to tax his costs on the *posse* as in other actions, and sue out a *copias ad satisfaciendum* against the plaintiff; and if upon shewing the said writ under seal to the lessor of the plaintiff,

plaintiff, and serving him with a copy of the rule by consent to confess lease, entry, and ouster, the lessor of the plaintiff does not pay them, the court will grant an attachment against him.

If the plaintiff is nonsuited, he may pay the costs to which of the defendants he pleases. Str. 516.

(F) Of the Judgment in Ejectment.

A judgment in ejectment is a recovery of the possession (not of the seisin or freehold) without prejudice to the right, as it may afterwards appear between the parties. He who enters under it, in truth and substance, can only be possessed according to right, *prout lex postulat*. If he has a freehold, he is in as a freeholder; if he has a chattel interest, he is in as a termor, and in respect of the freehold, his possession enures according to his right. If he has no title he is in as a trespasser, and without any re-entry by the true owner, is liable to account for the profits. *Taylor dem. Atkyns v. Horde*, 1 Burr. 114.

It is now settled that plaintiff shall recover according to his title, provided he demands more than he is entitled to; for the greater shall cover the less; but if less be claimed by the declaration, he can only have a verdict to the amount claimed. In a declaration therefore for the whole of any premises, a moiety may be recovered; but not *vice versa*. So that the safest way is to declare for enough. *Denn dem. Burgess v. Purvis*, 1 Burr. 326.

But the judgment in such case must not be for a moiety only, but that plaintiff recover his term, and he must take out execution for no more than he has a right to recover. *Far v. Denn*, 1 Burr. 362.

If the plaintiff has a verdict for all, the entry of the judgment is, that the plaintiff recover his term against the defendant of and in the premises aforesaid, or that he recover possession of the term aforesaid; and formerly there need also to be judgment *quod defendens capiatur*. But there is no need of that now, as by stat. 5 & 6 W. & M. the *capiatur* fine is taken away. *Lindsey v. Clark*, Carth. 390. 5 Mod. 285.

If the verdict be only for part, the judgment is, that plaintiff recover his term in (that part), and (as to the other part whereof defendant is acquitted) that plaintiff be in mercy, and that defendant go thereof without day. See Cro. Car. 178.

And although defendant be acquitted as to part, yet if the judgment were entered, "that defendant be acquitted as

(F)

Nature and operation of the judgment.

On declaration for more, plaintiff may recover less, not vice versa.

How the judgment must be in such case.

How the entry of judgment must be if verdict for all.

If verdict for part.

Why it must not state that he is acquitted for part.

to that part," it would be error, because the judgment in this action is not final as in a writ of right, nor does it protect the defendant from any further suit, but only acquits him against the title set up by the plaintiff in the action; but as the plaintiff's demand was groundless, as to that part whereof the defendant was acquitted, the judgment as to that is, that the defendant goes without day; for the plaintiff as to that has no further cause to detain him longer in court. Cro. Eliz. 768.

How if term expires pending the suit.

As the judgment is possessory to recover the possession, if the term expires pending the suit, plaintiff cannot recover possession; because the court cannot give the plaintiff judgment for the land, when it appears upon the face of the record that his title to it is determined. Yet he shall have judgment for his damages since the trespass still remained, and the defendant unjustly withheld the possession at the time the action was brought. Co. Litt. 285. 4 D. & E. 683.

Verdict how it should be entered as the ground of the judgment.

As the verdict is the ground of the judgment, it ought not to be entered for more land or different parcels than the defendant was found guilty of by the verdict; but a variance between the verdict and judgment occasioned by the misprision or default of the clerk in entering the judgment, is not fatal, but hath been amended by the court after a writ of error brought.—As where the plaintiff had judgment, that he recover his term of a messuage and ten acres of land, and the verdict acquitted the defendant *quoad* the land, (by which the judgment was larger than the verdict,) and, because it appeared to be the misprision of the clerk, who had not pursued the verdict which ought to have been his guide in making up the judgment, and no mistake in point of law in giving the judgment, therefore the party ought not to suffer for his misprision, since the statute of 8 H. 6. c. 12. gives the judges, in affirmance of their judgment, power to amend and reform what in their discretion seems to be the misprision of clerks.

What mistake therein cured.

Judgment had against the wife only, baron dying between verdict and judgment.

If an ejectment be brought against baron and feme, and the plaintiff hath a verdict against both, and before judgment the husband dies, the plaintiff may, on the suggestion, have judgment against the wife; not only because this is a trespass committed by the wife, and that therefore she is punishable for her own act, which is injurious to another; but because, where the wife is found guilty of the ejectment, she must have obtained that unlawful possession, either jointly with her husband, and then it survives, or else she had the whole possession in her own right; and in either case the plaintiff may punish her, and recover the possession,

which is wholly in her on the death of her husband. Roll. Rep. 14. 2 Cro. Jac. 350.

In other cases of the death of either party. See *ante*, (E. 2).

(G) Of new Trial and Arrest of Judgment.

(G)

The parties have the same time to move for a new trial, or in arrest of judgment in ejectment, as in other actions. See Vol. I. Ch. xi. Sec. ii.

Of the time to move.

In what case a new trial shall be had, See Vol. I. Ch. xi. Sec. ii.

When new trial granted.

On motion for a new trial, on the judge before whom it was tried reporting, that the verdict (which was a general verdict for plaintiff) was good for part, and bad for part; a rule was made that plaintiff should take possession of that part of the premises only, as to which the judge reported in favour of the verdict. *Brooke dem. Mence v. Baldwin*, Barnes, 468.

How if verdict be good for part, and bad for part.

If by any intendment a judgment in ejectment after a verdict can be made good, the court will do it. As where on error brought after judgment for plaintiff, that he recover his terms, when the declaration was on two separate demises, by two different lessors of the very same premises, and for the very same term; and though objected, that the judgment being to recover his terms in the plural number, was wrong, as both the lessors could not have title to the same premises at one and the same time, the court affirmed the judgment. And the chief justice cited a case, Trin. 4 & 5 Geo. 3. *Fisher and Hughes*, where, upon three demises, by several lessors of the same premises, and judgment as to two demises, was entered for the plaintiff; and as to the other, for the defendant; the objection being, that there was judgment both for the plaintiff and defendant, yet the court held the judgment right. 1 Will. 1. S. C. Stra. 1180. *Morres Bart. v. Barry*.

What shall or shall not be sufficient ground to arrest the judgment.

So, where after judgment to recover his term, when there were two demises of different lands, and error brought, and objected, that the judgment being in the singular number to recover his term, was wrong. *Per cur.*—The judgment is to recover his term *de & in tenementis prædict.* which *reddendo singula singulis* is well enough, for there is but one term in each part of the premises. Stra. 835. *Werral v. Bent and another*.

But where on motion in arrest of judgment, the words in the declaration being one messuage or tenement, which is too uncertain, as tenement is all a man holds, and after judgment,

judgment, the sheriff cannot tell of what to deliver possession, the court made a rule to stay judgment till cause shewn, and afterwards judgment was arrested. *Barnes*, 173. *Makepeace v. Hopwood*.

The ejectment was brought for one messuage, with the appurtenances in the parishes of A. or B. or one of them; and though after a verdict for plaintiff, judgment was arrested for the uncertainty. *Barnes*, 184. *Goodright dem. Griffin v. Foxson*.

But now an ejectment for a messuage and tenement,

So, for a messuage or tenement is good after verdict. *Doe dem. Stewart v. Denton*, 1 D. & E. 11.

On motion in arrest of judgment, the demise being laid on a day not then arrived, held no objection. *Small dem. Baker v. Cole*, 2 Burr. 1159.

In ejectment against two defendants, the declaration was, that *he* entered, instead of *they* entered; and on motion in arrest of judgment, the court at first held it to be bad, but afterwards ordered it to be amended on the authorities of *Cro. Jac.* 306. And plaintiff had judgment. *Salk.* 48. *Bishop of Worcester's case*.

Trespass and ejectment by original; motion in arrest of judgment upon a fault in the original (for a bad original is not helped by verdict); but the Master certifying there was no original at all, the plaintiff had judgment, though in his declaration he recited an original. 1 Mod. 3. *Kedman v. Edolfe*.

In the declaration in stating the demise, the *vill* was omitted where the lands laid, but in the subsequent part, the ejectment was stated to have been at Haswell. And it being moved in arrest of judgment, the court held, that it amounted to a sufficient certainty, that the lands lay in the *vill* of Haswell, and discharged the rule. 2 Black. Rep. 706: *Goodright dem. Smallwood v. Stotter*.

Verdict for an acre of land, described only as laid, though in fact there was a wall and porch, and part of a house built by it (by encroachment); held good. *Goodtitle dem. Chefter v. Alker*, 1 Burr. 135.

A regular judgment may be set aside.

Whether after verdict or by default.

A regular judgment in ejectment may be set aside, both in B. R. and C. B. *Dobbs v. Passer*, Str. 795.

And there is no distinction between a judgment in ejectment upon a verdict, and one by default; in the former the plaintiff's right is found, in the latter confessed. *Astin v. Parkin*, 2 Burr. 667.

(H) Of the Execution.

(H)

If the plaintiff has judgment to recover his term, he may enter without suing out an *habere facias possessionem*; for where the land recovered is certain, the recoverer may enter at his own peril, and the assistance of the sheriff is only to preserve the peace. 2 Sid. 156. 1 Roll. Rep. 213. Noy, 71. Palm. 263.

Plaintiff may enter without execution.

The usual and regular way however is, to make out writ of *habere facias possessionem*, which is engrossed on a 2 s. 6d. stamp parchment, and signed and sealed, and for which a *precipe* is made out; it is carried to the proper sheriff's office, who makes out a warrant thereon, and will put lessor of plaintiff into possession.

Practice otherwise.

Of the writ of possession.

It has relation to the *teste*, therefore, if tested the last day of the preceding term, it may be sued out though the lessor plaintiff be since dead. *Doe dem. Beyer v. Roe*, 4 Burr. 1970.

Has relation to the teste.

Under the writ of possession, it is at plaintiff's peril to take more than he is strictly entitled to, and he is to point out to the sheriff the particular premises which are to be taken in execution; if he should take more, court will on motion order it to be restored. 5 Burr. 2673, *Connor v. West*. 1 Burr. 638, *Cottingham v. King*. 3 Wil. 49. Bar. 191. And as the sheriff would also be answerable, he first takes an indemnity from plaintiff. Law of Eject. 110.

What may be taken under it.

Of proceedings thereon.

If there are several messuages in possession of different tenants, sheriff must go to all their houses and turn them out; the delivery of the possession of one tenement in the name of all, is not sufficient. 2 Roll. Ab. 180.

Ejectment will lie by the owner of the soil, for land which is part of the king's highway; for the owner of the soil has a right to all above and under the ground, except only the right of passage, and he may recover the land subject to the easement; and the sheriff must deliver possession subject to the easement. *Goodtitle dem. Chester v. Alker and another*, 1 Burr. 133.

How if ejectment was king's highway.

The words of the writ are, *quod habere facias possessionem*; so that there must be a full and actual possession given by the sheriff, and consequently all power necessary for this end must be given him; and therefore if the recovery be of a house, the sheriff may justify breaking open the door, if he be denied entrance by the tenant, because the writ cannot be otherwise executed. 5 Co. 91. b. Law of Eject. 108.

What kind of possession must be given.

If the sheriff turns out all persons he can find in the house, and gives the plaintiff, as he thinks, quiet possession; and, after the sheriff is gone, there appears some persons to be lurking in the house, that is no good execution; and therefore the plaintiff shall have a new *habere facias possessionem*: because he never had execution. *Upton v. Wells*, Leon. 143. But 2. now?

If the execution goes to the sheriff for twenty acres, the sheriff must give twenty acres, according to the common estimation of the country where the lands are. Roll. Rep. 410.

Attachment
granted for not
giving posses-
sion according
to rule of court.

An attachment was granted absolute in the first instance, against the tenant in possession, on affidavit that he had been served with a rule of court, made absolute, for delivering up the possession, and had refused so to do. *Davies dem. Povey v. Doe*, East. 13 Geo. 3. 2 Black. Rep. 892.

Of restitution
ordered.

A judgment irregularly obtained was set aside, and the possession given upon the execution ordered to be restored. But the lessor of plaintiff (who held the possession) absconding, the rule became ineffectual; whereupon it was moved, on behalf of the late tenants, for a writ of restitution, which the court awarded accordingly. *Barnes*, 178, *Goodright dem. Russell v. Norright*.

When scire fa-
cias necessary.

If the plaintiff neglect to sue out his writ of possession for a year and a day after judgment, he must revive the judgment by *scire facias* as in other cases, or the court will award a restitution *quia erroneè emanavit*. *Withers v. Harris*, 1 Sal. 258. Ld. Ray. 806. Sid. 351.

Unless the stay of execution is by consent of the parties, or defendant brings error, and is afterwards nonsuited. 6 Mod. 288. Ld. Ray. 807. 2 Sal. 218. Bar. 132. Str. 360.

But if the delay be by injunction, there must be a *sci. fa.*, courts of law not taking notice of chancery injunctions. *Winter v. Lightbound*, Str. 301.

Unless the party has taken out his execution within the year, and continued it down by *vic. non misit breve*, which may be done without a breach of injunction. Sal. 322. 6 Mod. 388.

Of proceeding
thereon.

If after judgment and before execution, defendant in ejectment dies, and a *sci. fa.* goes, it must be against the terretenants of the land, (and the heir may come in as terretenant,) and not against the executor, without naming him terretenant. *Dayley v. Walker*, Carth. 2. *Eyres v. Taunton*, Cro. Car. 225. 319. 2 Keb. 143.

(I) Of the Writ of Error.

(1)

It has been already observed that by the consent rule, defendant undertakes to appear, and receive a declaration; the necessity of an original writ therefore, if the proceedings are in the Common Pleas, is superseded; because as the tenant is to appear and receive a declaration, he cannot take advantage of the want of an original, unless in a writ of error; but when a writ of error is brought, the plaintiff must file an original, unless it be after verdict, when it is helped by stat. 38 El. c. 14.

How to proceed
if error brought.

And as in the Common Pleas there is no need of an original (which is the same in B. R. when proceedings are by original); so in B. R. when proceedings are by bill, there is no necessity for a latitat or bill of ejectment; but the party must file bail before he can proceed, because the court has no authority to proceed in the ejectment by bill, unless the defendant be in custody; but if a writ of error be brought, he must file a bill of ejectment, before errors are assigned. Run. Eject. 204.

The casual ejector cannot bring error, being a mere nominal person; that writ therefore can only be brought after defendant has appeared, and confessed lease, entry, and ouster. *Orion v. Mee*, Bar. 189.

Casual ejector
cannot bring
error.

So, if the landlord be permitted to defend, a writ of error cannot issue in the name of the casual ejector. 2 Burr. 657.

But it is otherwise if the writ of error be from an inferior court, because they are not competent to proceed by a rule for confessing. Run. Eject. 152. 421. Or if an infant be tenant in possession, and judgment be against casual ejector, because there is no laches in him for not confessing. Ld. Ray. 93. 1 Keb. 705. 740.

Except from an
inferior court.

Or if infant be
tenant.

But when the landlord is admitted defendant under the stat. 11 G. 2., he may bring a writ of error, and it is a sufficient reason against taking out execution. Str. 1241. *Jones v. Edwards*, Bar. 208.

Q. If landlord,
made defend-
ant, may.

Though it has been since said that the proper opportunity for the landlord to make his stand against the execution is, by shewing the error as cause against the plaintiff's motion, for leave to take it out. And if he omits this opportunity, execution regularly issued shall not be set aside. *George dem. Bradley v. Wisdom*, Burr. Rep. 757.

Or whether he
should not make
his stand at ano-
ther time.

(K) Of

(K)

(K) Of Proceedings in K. B. by Original.

If the plaintiff proceeds in ejectment by original, he does not sue out his original writ at first, but proceeds by delivering his declaration as by bill; but if a writ of error should be brought, he must sue out his original writ, which must be returned by the sheriff, and filed in the treasury; or if the tenant has not appeared, the original must be sued, returned, and filed properly; and if he has appeared, then, on suing out the original, you must insert his name, instead of the nominal defendant.

The appearance, when by original in B. R. is entered with the filazer, in like manner as it is in other suits by original; and the writs are made out returnable on a general return day, as in other cases.

The *præcipe* for the curfitor, to make out the original writ by, is as follows:

Middlesex, to wit. If John Denn shall make you secure, &c. then put, &c. Richard Fenn, late of, &c. that he be before our lord the king, on wheresoever, &c. to shew wherefore, &c. with force and arms, he entered into four messuages, &c. [reciting the premises], with the appurtenances, in the parish of St. Mary, Islington, in the county of Middlesex, which William Smith demised to him for a term, which is not yet expired, and ejected, &c. and other enormities, &c. against the peace, &c. and to the damage, &c.

— July 1798.

O. P.

SECTION III.

Of Proceedings in Ejectment in particular Cases.

(A) Of Proceedings by Landlord against Tenant on 4 Geo. 2.

(B) Where the Premises are untenanted, and the Case is not within the Statute of 4 Geo. 2.

(C) Of Proceedings by Mortgagee.

(D) Of Proceedings by Corporations.

(E) Of Proceedings in Inferior Courts.

(F) Of Proceedings by and against Infants in Ejectment.

(A) Of

(A) Of Proceedings by Landlord against Tenant on a Right of Re-entry under 4 Geo. 2.

(A)

One of the most usual and provident clauses in a lease is, that of giving the lessor a power of re-entry in case of non-payment of rent or the like; but as many niceties attended this re-entry at common law, even though the lessor upon the breach of the covenant was entitled to it, and much inconvenience was thereby occasioned, the legislature in favour of landlords enacted by the 4 Geo. 2. c. 21. s. 2. " That

" in all cases between landlord and tenant, as often as it

" shall happen that one half year's rent shall be in arrear,

" and the landlord or lessor to whom the same is due, hath

" right by law to re-enter for the non-payment thereof;

" such landlord or lessor shall and may, without any formal

" demand or re-entry, serve a declaration in ejectment for

" the recovery of the demised premises; or, in case the same

" cannot be legally served, or no tenant be in actual possession of the premises, then to affix the same upon the door

" of any demised messuage; or in case such ejectment shall

" not be for the recovery of any messuage, then upon some

" notorious place of the lands, tenements, or hereditaments, comprised in such declaration in ejectment,

" and such affixing shall be deemed legal service thereof;

" which service or affixing such declaration in ejectment

" shall stand in the place and stead of a demand and re-entry; and, in case of judgment against the casual ejector,

" or nonsuit, for not confessing lease, entry, and ouster, it

" shall be made appear to the court, where the said suit is

" depending, by affidavit, or be proved upon the trial, in

" case the defendant appears, *that half a year's rent was due*

" *before the said declaration was served; and that no sufficient*

" *distress was to be found on the demised premises countervailing*

" *the arrears then due; and that the lessor or lessors in ejectment*

" *had power to re-enter;* then, and in every such case, the

" lessor or lessors in ejectment, shall recover judgment and

" execution, in the same manner as if the rent in arrear had

" been legally demanded, and a re-entry made; and in case

" the lessee or lessees, his, her, or their assignee or assignees,

" or other person or persons claiming or deriving under the

" said leases, shall permit and suffer judgment to be had and

" recovered on such ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without filing any bill or bills for

" relief in equity, within six calendar months after such

" execution executed; then, and in such case, such lessee, or

" lessees,

Statute 4 Geo.
2. c. 21.

“ lessees, &c. and all others claiming and deriving under the
 “ said lease, shall be barred or foreclosed from all relief or
 “ remedy in law or equity, other than by writ of error for
 “ reversal of such judgment, in case the same shall be er-
 “ roneous; and the said landlord or lessor shall, from
 “ thenceforth, hold the said demised premises discharged
 “ from such lease: and if, on such ejectment, verdict shall
 “ pass for the defendant, or the plaintiff shall be nonsuited
 “ therein, except for the defendant’s not confessing, &c.
 “ then, in every such case, such defendant shall have and re-
 “ cover his, her, or their full costs: Provided always, That
 “ nothing herein contained shall extend to bar the right of
 “ any mortgagee or mortgagees of such lease, or any part
 “ thereof, who shall not be in possession, so as such mort-
 “ gagee or mortgagees shall and do, within six calendar
 “ months after such judgment obtained, and execution exe-
 “ cuted, pay all rent in arrear, and all costs and damages
 “ sustained by such lessor, person or persons entitled to the
 “ remainder or reversion as aforesaid, and perform all the
 “ covenants and agreements, which, on the part and behalf
 “ of the first lessee or lessees, are and ought to be per-
 “ formed.”

Proviso as to
mortgagees.

As to filing bill
in equity for an
injunction.

By sect. 3. “ A lessee, filing a bill in equity, shall not have
 “ an injunction, unless within forty days after the answer of
 “ the lessor, he brings into court so much as the lessor shall
 “ in his said answer swear to be due, over and above allow-
 “ ances and costs, there to remain till hearing, or to be paid
 “ to the lessor, subject to the decree of the court: and in
 “ case such bill shall be filed within the time, and after exe-
 “ cution executed, the lessor of the plaintiff shall be ac-
 “ countable only for so much, and no more, as he shall
 “ really make *bonâ fide* of the demised premises from the
 “ time of his entering into possession; and if what shall be
 “ so made shall appear to be less than the rent reserved on
 “ the lease, then the lessee, &c. shall, before he be restored
 “ to his possession, pay to the lessor the deficiency.”

As to paying
into court rent
and arrears.

Sect. 4. Provided, “ That if the tenant, &c. shall, at any
 “ time before the trial in such ejectment, pay or tender to
 “ the lessor, &c. or pay into court all the rent and arrears,
 “ together with costs, then further proceedings on the eject-
 “ ment shall cease; and if the lessee, &c. shall, upon the
 “ bill filed as aforesaid, be relieved in equity, such lessee,
 “ &c. shall hold the demised premises according to the lease
 “ thereof, without any new lease to be made thereof.”

Its extent.

The above statement only relates to ejectment for non-
 payment of rent, where the landlord has a right to re-
 enter.

The

The true end of this act of parliament is to take off from the landlord the inconvenience of his continuing always liable to an uncertainty of possession, (from its remaining in the power of the tenant to offer him a compensation at any time, in order to found an application for relief in equity,) and to limit and confine the tenant to six calendar months after execution executed, for his doing this; or else, that the landlord should from thenceforth hold the demised premises discharged from the lease. *Doe dem. Hutchins v. Lewis, Burr. 614.*

Courts of law always lean against forfeitures as courts of equity relieve against them; whenever therefore a landlord means to take advantage of any breach of covenant, so as that it should operate as a forfeiture of the lease, he must take care not to do any thing which may be deemed as an acknowledgment of the tenancy, and so operate as a waiver of the forfeiture.

What deemed a waiver of the forfeiture.

He must not therefore bring an action upon the covenant for payment of rent, which became due since the forfeiture accrued. *Doe dem. Crompton v. Minshull, East. 33 Geo. 2.* Nor must he accept such rent. *Cow. 247.*

Action on the covenant.

An action for double rent on this statute, for holding over, will be barred by an acceptance of rent accrued since.

Action of rent barred by acceptance of rent. Of tender of rent, or paying it into court after forfeiture.

But though the tenant has incurred a forfeiture under the statute, yet he may stay the proceedings either by tendering the rent, before an ejectment is delivered, *Goodright dem. Stevenson v. Noright, 2 Black. Rep. 746.*; or by moving to pay into court all the rent due, and costs, any time before writ of possession executed, even after judgment against the casual ejector. *Goodtitle v. Holdfast, Str. 900. Cooke's Rep. 6. Anon.*

Or it may be done by summons in vacation time.

The courts had permitted the tenant to bring into court the arrears of rent and costs, antecedent to this act. *Gregg's Case, Sal. 597.*

In ejectment by a landlord, the tenant moved to stay proceedings upon payment of rent, arrears and costs, according to sect. 4. of the above act. And, on a rule to shew cause, it was insisted for the plaintiff, that the case was not within the act, but that it was brought likewise on a clause of re-entry in the lease for not repairing; and the lease was produced in court. However, the rule was made absolute, with liberty for the plaintiff to proceed upon any other title. *Piere dem. Withers v. Sturdy, H. 1752.*

When allowed.

Lessors of plaintiff were both devisees and executors, and in each capacity rent was due to them. Defendant moved to stay proceedings on payment of the rent due to lessors of plaintiff

plaintiff as devisees, they not being entitled to bring an ejectment as executors. There appeared to be a mutual debt due to defendant by simple contract, and defendant offered to go into the whole account, taking in both demands as devisees and executors, having just allowances; which lessors of plaintiff refused. The rule was made absolute to stay proceedings, on payment of the rent due to lessors, as devisees, and costs. *Duckworth dem. Tubley and others v. Tunstall, Barnes, 184.*

When demand of rent necessary.

If the lease specifies that a demand of the rent should be made, ejectment cannot be brought till such demand made; but without such stipulation, no demand is necessary; but only the six months rent should be in arrear, and no sufficient distress. *Goodright v. Cater, Doug. 486.*

Of the affidavit under stat. 4 Geo. 2.

In moving for judgment upon a declaration in ejectment delivered, or in case of no tenant affixed on the premises, according to this act of 4 Geo. 2. c. 28. the courts require an affidavit, that there was half a year's rent in arrear before declaration served, that the lessor of the plaintiff had a right to re-enter, that no sufficient distress was to be found on the premises countervailing the arrears of rent then due, that the premises were untenanted, or that the tenant could not be legally served with the declaration (as the case is), and that a copy of the declaration was fixed on the most notorious, and what part of the premises, or the court will not give a rule for judgment.

When necessary.

This affidavit is only necessary upon moving for judgment against the casual ejector, or after a nonsuit at the trial for the tenant's not confessing lease, entry, and ouster.

At a trial some facts must be proved.

But if the tenant appears, and the ejectment comes to a trial, all the matters of the above affidavit must be proved upon the trial. Per *Dennison, Just.* in the case of *Doe dem. Hitchings v. Lewis, 1 Burr. 614.*

The late tenant, or other person, claiming title to the premises, has the same time to appear in as is allowed to tenants in possession.

Of the declaration.

The declaration in ejectment is prepared in the usual way, taking care to lay the demise after the forfeiture accrued.

Of proceedings after appearance, or in case of no appearance.

After appearance the proceedings are the same as in other cases; so in case of no appearance plaintiff moves for judgment against the casual ejector on the affidavit above-mentioned, and proceeds as in common ejectments.

Thus by the statute of 4 Geo. 2. where the case comes within it, there is no occasion for the landlord to make an actual entry, and seal a lease on the premises, which must be done in all other cases where the premises are untenanted, as will be presently shewn; nor is there any occasion to prove

at

at the trial, any actual entry or ouster; if defendant appears, the common consent rule is sufficiently binding. *Hart v. Carter*, Doug. 483.

Ejectment brought by landlord against his tenant, under 4 Geo. 2. c. 28. §. 2. and judgment had against the casual ejector by default, and possession thereupon delivered. Near twenty years after, the tenant brings an ejectment against the same landlord for the same premises. The landlord (who is defendant in this latter ejectment) is not obliged to produce such an affidavit as this clause requires, as an essential requisite previous to his original recovery, for, as it was essentially requisite, the court will presume, that there was one regularly then made, and that judgment was founded upon it. *Doe dem. Hitchings v. Lewis*, 1 Burr, 614.

When the affidavit will be presumed.

Of Proceedings under 11 Geo. 2.

It may, in this place, be proper to notice a provision which the legislature has made for landlords in certain cases where tenants desert the premises, by statute 11 Geo. 2. c. 19. §. 16. which recites and enacts as follows:

And whereas landlords are often great sufferers by tenants running away in arrear, and not only suffering the demised premises to lie uncultivated without any distress thereon, whereby their landlords or lessors might be satisfied for the rent arrear, but also refusing to deliver up the possession of the demised premises, whereby the landlords are put to the expence and delay of recovering in ejectment; be it enacted, that from and after the 24th day of June 1738, if any tenant holding any lands, tenements, or hereditaments, at a rack rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall and may be lawful to and for two or more justices of the peace of the county, riding, division, or place, (having no interest in the demised premises,) at the request of the lessor or landlord, lessors or landlords, or his, her, or their bailiff or receiver, to go upon and view the same, and to affix, or cause to be affixed on the most notorious part of the premises, notice in writing what day (at the distance of fourteen days at least) they will return to take a second view thereof; and if upon such second view the tenant, or some person on his or her behalf, shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises; and

the lease thereof to such tenant, as to any demise therein contained, only shall from thenceforth become void.

Sect. 17. Provided always, that such proceedings of the said justices shall be examinable in a summary way, by the next justice or justices of assize of the respective counties in which such lands or premises lie; and if they lie in London or Middlesex, by the judges of the court of King's Bench and Common Pleas; if in the counties palatine, by the judges thereof; or if in Wales, then before the courts of Grand Sessions; who are thereby respectively empowered to order restitution to be made to such tenant, together with his or her expences and costs, to be paid by the lessor or landlord, if they shall see cause for the same; and in case they shall affirm the act of the said justices, to award costs, not exceeding 5*l.*, for the frivolous appeal.

(B) (B) Where the Premises are untenanted, and the Case is not within the Statute of 4 Geo. 2.

Proceedings to recover vacant premises must be in the old way, by sealing lease, &c.

In the first section of this chapter we have endeavoured to shew the origin and meaning of the modern mode of proceeding in ejectment, and the distinction between that and the ancient method; from whence it may appear that the very ground-work of the present practice is, there being a tenant in possession, to whom a declaration as notice of the ejectment may be properly delivered; for if that circumstance fail and there be no tenant or occupier, but the premises are vacated, the old way of proceeding must be still pursued, except in the instances of landlord and tenant, provided for by statutes 4 Geo. 2. and 11 Geo. 2. just before treated of.

May be in person or by attorney.

This is done by entering upon the premises, and actually sealing a lease thereon, either in person or by attorney.

How to be done in person.

If the former method is preferred, the proceeding is thus:

A. (the person claiming title) must go upon the land before the escoin day of the term, and there seal and deliver a lease to B. (any friend of his as tenant,) and at the same time deliver him possession. This being done get C. (any other friend) to go upon the premises, and turn out B. the tenant, by thrusting him off the premises, and afterwards let C. (the ejector) remain on the premises, and whilst he continues there, serve him with a declaration in ejectment, in which make B. the tenant the plaintiff, A. (the person claiming title) the lessor, and C. (the actual ejector) the defendant, and declare on the demise in the lease, and subscribe a notice to appear as follows:

Mr.

Mr. B. F.

Take notice, that unless you appear in his Majesty's court of King's Bench at Westminster next Trinity term (or if a woman cause, the first day of next Trinity term,) at the suit of the above-named plaintiff B. and plead to this declaration in ejectment, judgment will be thereon entered against you by default.

Yours, &c.

Same notice in C. B. *mutatis mutandis*.

The declaration is the same as usual, only the real persons are made parties, instead of fictitious names. Of the declaration.

After service of declaration,

In K. B.

An affidavit must be made of sealing the lease, and of the ouster by defendant, and of all the facts. [For form whereof see post p. 132.] This is indorsed to move for judgment against the casual ejector, and unless defendant appears and enters into common rule, judgment may be signed as on a common ejectment.

In C. B.

There is no need of any affidavit, nor any motion for judgment, but on the first day of term give a rule to plead as in common actions, and if no appearance and plea at expiration of rule, sign judgment.

Of getting judgment.

If the landlord or person claiming title does not wish to enter himself and seal the lease, he may do it by attorney, in which case he may execute a power of attorney in the following form, and the proceedings are just the same; the attorney acting as the principal landlord. How by power of attorney.

The letter of attorney is to the following effect:

"Know all men by these presents, that I A. B. &c. have made, ordained, constituted, and in my stead and place, and by these presents do make, ordain, constitute, and in my stead and place put C. D. of, &c. my true and lawful attorney, for me, and in my name to enter into and take possession of all, &c. in the tenure of, &c. and when he hath taken possession thereof, and for me, in my name, and as my deed, to seal and execute a lease of the said premises unto E. F. of, &c. to hold the same to him, his executors, administrators, and assigns, from last past, before the date hereof, for the term of years, at the yearly rent of a pepper-corn, if lawfully demanded, subject to a proviso, to be void on my tendering of 6d. to the said E. F.
"In witness," &c.

Form of power of attorney.

K 2

H. H.

"H. H. maketh oath, that he was present and did see A. B. of, &c. duly sign, seal, and deliver the letter of attorney hereunto annexed."

The lease referred to by the foregoing letter of attorney:

Form of lease.

This indenture made, &c. between A. B. of, &c. of the one part, and E. F. of, &c. of the other part, witnesseth, that the said A. B. for and in consideration of the sum of 5*s.* of lawful, &c. to him in hand paid by the said E. F. at and before the sealing and delivery of these presents, the receipt whereof the said A. B. doth hereby acknowledge, hath granted, demised, set, and to farm let unto the said E. F. his executors and administrators, all, &c. now or late in the tenure of, &c. to have and to hold the said hereinbefore mentioned and hereby demised premises, with all and every their appurtenances, unto the said E. F. his executors, administrators, and assigns, from the day of last past, before the date of these presents, unto the full end and term of five years from thence next ensuing, and fully to be complete and ended, yielding and paying therefore, during the said term, unto the said A. B. or his assigns, the rent of one pepper-corn, at the feast of yearly (if lawfully demanded): provided always, and these presents are on this condition nevertheless, that if the said A. B. or his assigns, shall, at any time or times hereafter, tender, or cause to be tendered, unto the said E. F. the sum of 6*d.* that then and in such case, and from thenceforth, this indenture, and every thing herein contained, shall cease, determine, and be absolutely void; any thing herein contained to the contrary thereof in anywise notwithstanding.

The attorney is to write the name of his principal.

Sealed and delivered as the act and deed of the above-named A. B. by C. D. of, &c. by virtue of a letter of attorney to him for that purpose made by the said A. B. bearing date the day of this instant, being first duly stamped in the presence of

Form of affidavit.
vic.

The form of the affidavit, required of the proceedings in case of a vacant possession, is as follows:

H. H. of, &c. maketh oath and faith, that he this deponent, on, &c. now last past, did see C. D. of, &c. for and in the name of A. B. the lessor of the premises in this cause, severally enter upon and take possession of part of the premises in the deed hereunto annexed mentioned, by entering into the first of the said houses, and putting his foot on the threshold

threshold of the outer doors of two other of the said houses, the same being locked and uninhabited, so that no other entry thereon, or possession thereof, could be made or taken without force. And this deponent did then likewise see the said C. D. after such his entry into and upon the said premises, and whilst he was in such possession thereof as aforesaid, at each of the said houses, seal and deliver the lease hereunto annexed unto the plaintiff; and further saith, that after the said lease was so executed, this deponent did see the plaintiff take possession of the said three houses, with their appurtenances, by virtue of the said lease, by entering upon the threshold of the said outer doors of the said three houses, the same being then locked and uninhabited, and no other entry to be made therein, save as aforesaid; and this deponent saith, that immediately afterwards the defendant did enter each and every of the said three houses, and turned the plaintiff out of possession thereof, by thrusting him out of the same; whereupon this deponent did then and there deliver and leave with the said defendant a true copy of the declaration hereunto annexed.

H. H.

Sworn, &c.

This affidavit will do where there is no power of attorney, leaving out that part.

To warrant the above proceedings, the premises must be vacant; they must be wholly deserted by the tenant; and the lessor of the plaintiff not able to find out where the tenant is to serve him with an ejectment.

The lessee of a public-house took another, and removed his goods and family, but left beer in the cellar. And there being rent in arrear, the landlord sealed a lease, as on a vacant possession, delivered an ejectment, and signed judgment, which was set aside, the lessee still continuing in possession. And a case was mentioned, where leaving hay in a barn at Hendon was held to be keeping possession. It further appeared in this case, that the attorney for the plaintiff knew, whether the lessee removed, and might have served him personally, which is not necessary to be done upon the premises. And in the case of renting ground, to which there is no house or barn, if it is known where the tenant lives, he must be served. *Savage v. Dent*, 2 Str. 1064.

In cases of a vacant possession, no person claiming title will be let in by the courts to defend, but he that can first seal a lease on the premises, must obtain possession. Bull. Ni. Pri. 96. And therefore the person claiming title, must resort to his new ejectment.

K 3

Motion

What deemed a
vacant posses-
sion, raised a
new

No person let in
to defend.

Motion that B. and B. who claimed title to some lands and tenements in Middlesex, (the possession whereof was vacant,) might be informed by the attorney for the person, who was carrying on the proceeding in the old way, under a lease sealed on the premises, of the names of the parties in ejectment, in order that B. and B. might appear and defend the title. It was urged for the attorney, that in all cases of a vacant possession, unless such as are within the 4 Geo. 2. concerning landlords and tenants by lease, with a clause of re-entry, no instance can be shewn where any person claiming title hath been let in to defend; but he that can first seal a lease upon the premises, must obtain possession, and any other person claiming title may eject him if he can: and by the course of the court, no defence can be made in these cases but by the defendant in the ejectment, who is a real ejector. Barnes, 177. *Ex parte Beauchamp and Burt.*

But Q. now?

But in Imp. K. B. Pract. 537. it is said, any person claiming title to the premises, and who are usually admitted by the court, may with leave appear and enter into the common rule, upon motion made for that purpose.

(C)

(C) Of Proceedings by Mortgagee.

Of proceedings by mortgagee.

The proceedings by a mortgagee are as in other cases, that is to say, whenever he has a right of entry, and the premises are tenanted, he serves an ejectment, and pursues the modern practice; but if the premises be vacant, he follows the ancient method by sealing a lease as above described.

When he may proceed against the tenant, and how.

As a mortgagor is considered as a tenant at will in the strictest sense to the mortgagee, who may be turned out without notice; if any lease be granted by him subsequent to the mortgage, without the privity of the mortgagee, the latter may eject the tenant without any notice to quit. *Keach v. Hall*, Doug. 21.

If to get possession of the premises.

But if subsequent to a lease granted, or even pending a tenancy from year to year, the mortgage is made; mortgagee must give six months notice. *Birch v. Wright*, 1 D. & E. 379.

If only into receipt of rents.

That is, if he wishes to gain possession; but if he only wants to get into the receipt of the rent and profits, there is no need of an ejectment; he need only give notice to the tenant, that he does not intend to disturb his possession, but requires the rent to be paid to him instead of the mortgagor; and if tenant refuses, he may distrain, *Moss v. Gallimore*, Doug. 232.; and this though the lease be prior to the mortgage.

Though

Though formerly an ejectment was held necessary to get into receipt of the rents. Bull. Ni. Prii 96.

In ejectment of tenants of the mortgagor, he defended, and plaintiff only proved the mortgage, and such proof was held not to be sufficient; for he should have proved the lands in possession of the persons to whom the ejectments were delivered, as the defendant only admits himself landlord to them of lands in their possession. 2 Crompt. Prac. 194.

By the 7 Geo. 2. c. 20. An act for the more easy redemption and foreclosure of mortgages, after reciting, that "mortgagees frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagers to pay the money secured by such mortgages, and for performing the covenants therein contained; and likewise commence suits in equity, to foreclose their mortgagers from redeeming their estates; and the courts of law, where such ejectments are brought, have not power to compel such mortgagees to accept the principal monies and interests due on such mortgages and costs, or to stay such mortgagers from proceeding to judgment and execution in such actions, but such mortgagers must have recourse to equity for that purpose; in which case likewise, the courts of equity do not give relief until the hearing of the cause." For remedy, &c. it is enacted, "That where any action shall be brought on any bond, for payment of money secured by such mortgage or performance of the covenants therein contained, or where any action of ejectment shall be brought in any of the courts at Westminster, great sessions, or superior courts of the counties palatine, by any mortgagee, &c. his heirs, executors, administrators, or assigns, for the recovery of the possession of any mortgaged lands, &c. and no suit shall be then depending in any of his Majesty's courts of equity, for or touching the foreclosing or redeeming of such mortgaged premises; if the person, having right to redeem such mortgaged premises, and who shall appear and become defendant in such action, shall at any time, pending such action, pay unto such mortgagee, &c. or, in case of his refusal, shall bring into court, where such action shall be depending, all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit at law or in equity upon such mortgage [such money for principal, interest, and costs, to be ascertained and computed by the proper officer of the court], the monies so paid, or brought into court, shall be deemed and taken to

Of 7 Geo. 2. c. 20. and paying principal and interest to mortgagee in case of ejectment brought.

shall be deemed and taken to be paid, or brought into court, shall be deemed and taken to

"be in full satisfaction and discharge of such mortgage;
 "and the court shall and may discharge such mortgager of
 "aid from the same accordingly; and shall and may, by
 "rule of the same court, compel such mortgagee, at the
 "costs and charges of such mortgager, to assign, surrender,
 "or reconvey such mortgaged premises, and such an interest
 "therein as the mortgagee hath, and deliver up all deeds,
 "&c. in his custody, relating to the title thereof, to the
 "mortgager, who shall have paid or brought such monies
 "into court, or his executors, &c. or other persons as he
 "shall appoint."

The second section enacts, "That on bills of foreclosure
 brought in equity for the payment of the money, or in
 default thereof for the recovery of the premises, such
 court of equity, upon application of the defendant hav-
 ing a right to redeem, and upon admission of the plain-
 tiff's right, may, before hearing, make order therein, as
 "if the cause had been brought to a hearing," &c.

Provided, "That this act shall not extend to cases
 "where the right of redemption is controverted or the
 "money due not adjusted, nor to prejudice any subsequent
 "mortgage."

In motion on this act there should be an affidavit that no
 bill in equity has been brought.

A judge made an order, pursuant to this act, to stay the
 mortgagee's proceeding in ejectment, upon bringing princi-
 pal, interest, and costs, into court; and a rule was made to
 make the order a rule of court *nisi*. But it afterwards ap-
 pearing to the court, that notice had been given by the mort-
 gagee to the mortgager, that he insisted upon payment of
 two bonds, which were a lien upon the estate, the case was
 adjudged to be out of this act, and the rule *nisi* was dis-
 charged. Barnes, 177. *Felton v. Ash*.

Motion to stay proceedings in ejectment, on payment of
 mortgage-money and costs, pursuant to this act; on shew-
 ing cause, the plaintiff produced an affidavit, that the mort-
 gagee had been at great expence in necessary repairs of part
 of the premises in his possession (the ejectment was brought
 for the residue), and therefore prayed, that the prothonotary
 might be directed to make allowance for such repairs. *Per*
cur.—The rule must follow the words of the statute. The
 prothonotary will make just allowances and deductions.
 Barnes, 176. *Goodright v. Moore*.

Rule on stat. 7 Geo. 2. to shew cause why proceedings
 should not be stayed, on payment of mortgage-money and
 costs, was made absolute; the lessors of plaintiff, assignees
 of the mortgagee, insisted to be paid a bond, and a simple
 contract

In what cases
 this will be al-
 lowed.

contract debt due to themselves in their own right. *Per cur.*—A bond is no lien in equity, unless where the heir comes to redeem. Barnes, 182. *Bingham dem. Lane and others v. Gregg.*

Motion to stay proceedings in an action of a bond for performance of covenant in a mortgage-deed, and also in an ejectment upon the same mortgage, on paying principal, interest, and costs, to be taxed by the Master, into court, and that defendant who was a prisoner might be discharged. It was objected, that defendant had agreed to convey equity of redemption to plaintiff; but it appearing on affidavit that plaintiff had not tendered to defendant a conveyance to be executed, and that no bill in equity was brought, the court granted the motion. *Skinner v. Stacy*, 1 Will. 80.

It has been since determined, that the court will not stay the proceedings in an ejectment brought by a mortgagee against a mortgagor, on the latter paying principal, interest, and costs, if the latter has agreed to convey the equity of redemption to the mortgagee. *Goodtitle v. Pope*, 7 D. & E. 185.

Where there are two or more mortgages, the court will not stay proceedings, and compel a redemption of one mortgage only, upon payment of the principal, interest, and costs on that mortgage, without paying the rest. *Roe dem. Kaye v. Soley*, assignee, Mich. 11 Geo. 3. C. B. 2 Black. Rep. 726.

(D) Of Proceedings by Corporations.

(D)

It used formerly to be the practice, when a corporation was lessor of the plaintiff, for them to execute a power of attorney, authorising some person to enter and make a lease on the land; because a corporation cannot make an attorney or bailiff but by deed, nor appear, but by making a proper person their attorney by deed. They cannot, therefore, enter and demise upon the land in person as natural persons can, nor substitute an attorney to enter into a rule for their costs, nor will an attachment go against them for disobedience to that rule. Hence formerly they made an actual lease upon the land which was to try the title, and then the attorney proceeded in the common method.

Why.

But this mode appears now unnecessary; for first, in *Partridge v. Ball*, Lord Ray. 136. which was an ejectment on a demise of a corporation, although the declaration did not state the demise to be by deed, or under the seal of the corporation, yet it was held good: And the case of *Swadley v. Piers*, Cro. Jac. 613. was said to be law; and the reason given

How rendered unnecessary.

given by C. J. Holt was, "for now ejectments are grounded 'on fiction.'" It is true, this case was after verdict; but why should it not be equally good before verdict? the reason equally applies to both cases.

But secondly, though the declaration state the demise to be by deed, or under seal of the corporation, yet no such lease need be proved at the trial; for *per* Lord Kenyon, "by the common rule and appearance the lease was admitted as 'stated.'" *Mayor, &c. of Canterbury v. Wood*, Sum. Ass. 1794, Run. Eject. 150.

How proceedings may now be.

Perhaps the best way, therefore, is to proceed in the usual way, only stating the demise to be by deed, and under the corporation seal. Defendant cannot avail himself of the fact being otherwise; for if he appears, he must enter into the consent rule, and having so done it will operate at the trial as an admission of such a lease.

Of the demise.

If a corporation be aggregate of many, they may set forth the demise in the declaration without mentioning the christian names of those who constitute the corporation; but if the corporation be sole, as if the demise be by a bishop, the name of baptism must be inserted: because, in the first case, the name solely consists in its character, but in the last, in the person; therefore there cannot be a sufficient specification of that person without mentioning his name. *Dyer*, 86.

(E)

(E) Of Proceedings in inferior Courts.

Proceedings in inferior courts must be by sealing a lease, &c.

If the proceedings be in an inferior court the plaintiff must proceed by actually sealing a lease, because inferior courts are not competent to make rules to confess lease, &c. and if they were, they have no power to enforce them. Inferior courts having but a limited authority cannot make new rules to bind persons who do not come in by the proper process of the court; but the superior courts having an unlimited authority in every thing within their jurisdiction may bind any person who consents to their rules. Hence in the former the lease is sealed on the land, and the defendant tries the title in the name of the casual ejector, to save expence.

Why.

How if afterwards removed by habeas corpus.

But if an ejectment be commenced in an inferior court, and an *habeas corpus* be brought to remove it, and the plaintiff in the ejectment declares against the casual ejector, there may be a rule to confess lease, &c. as if he had originally declared in the court above, and the court will not grant a *procedendo*.

When *procedendo* granted or not.

If an *habeas corpus* be brought to remove a cause in ejectment out of an inferior court, the lands lying within their jurisdiction, and the lessor of the plaintiff seal a lease on the premises,

premises, the courts above will grant a *procedendo*, because the title to the land is local, properly within the jurisdiction of the courts below, where, if it proceed regularly, it will not be prohibited; but if the lessor has not sealed a lease on the premises, the courts above will not grant a *procedendo*.

If the lands lie partly within the cinque ports and partly without, the defendant cannot plead above the jurisdiction of the cinque ports, for though the land be *local* yet the demise is *transitory*, and triable any where; therefore, though the plaintiff may lay his action for that which lies within an inferior jurisdiction in the court below, if he take proper measures for the purpose, yet if he will proceed in a superior court, as the demise is transitory, the defendant cannot stop his proceeding, because those courts have competent jurisdiction. 1 Keb. 690. 795. 2 Keb. 69. Run. Eject. 151, 152.

If lands lie part within and part without inferior jurisdiction, where action may be.

(F) Proceedings by Infants.

(F)

If the lessor of the plaintiff is an infant, after the plea is filed you may have a summons, or move the court for a rule "to shew cause why further proceedings should not be stayed, "until some person, on behalf of the lessor of the plaintiff, "gives security for payment of the defendant's costs, in case "of a nonsuit or a verdict for defendant, the lessor of the "plaintiff being an infant," Bar. 183.; and an order or rule will be granted though there is a real plaintiff named.

How security for costs may be had if infant plaintiff.

You petition in the same manner to appoint a guardian as under title of proceeding by and against infants, *ante*, Ch. xv. Sec. v.; and the guardian enters into common rule, and employs an attorney for that purpose. Imp. K. B. 560. C. B. 665.

Of the petition, &c.

By this practice, which first began in K. B. and afterwards was adopted in C. B., if an infant deliver a declaration to the defendant, some friend or guardian must be set up as plaintiff, to be responsible for the costs. Bar. 283. Str. 694. 932. 1 Will. 130. But if such person die insolvent, the infant himself must answer for the costs.

How infants liable to the costs.

Previous however to any motion in court, inquiry should be made whether there be a real and substantial plaintiff; for perhaps the guardian may undertake to pay the costs, and there may be no reason for court to interpose. Cowp. 128. Run. Eject. 188. (edit. 1795.)

Whether the demise should be stated in declaration, to be by deed and reserving rent, see *ante*, Sect. i. (A). See also this Section (D).

SECTION IV.

Of the Action for Mesne Profits.

Origin and
meaning of this
action.

In the first Section of this Chapter, it has been shewn, that before the time of Henry the Seventh plaintiffs in ejectment did not recover the term; but until about that time the *mesne* profits accruing to the ejector, were the measure of the damages given the ejected. So that by the old law and practice in ejectment, the plaintiff recovered nothing but damages, no term was recovered; but when it became established that the term should be recovered, the ejectment was put into the form of a real action; the proceeding was *in rem*, and the thing itself—the *term* only then was recovered, and nominal damages, but not the *mesne* profits; whereupon a mode of recovering the *mesne* profits [after the ejectment had been tried, and the plaintiff had recovered possession] in an action of trespass was introduced, and grafted upon the present fiction in ejectment; and the action of trespass for the *mesne* profits is put in the place of the ejectment at common law, which was a true, and not a fictitious action, and nothing more than an action of trespass. Vide *Goodtitle v. Toombs*, 3 Will. 120. *Aslin v. Parker*, 2 Burr. 665.

What the *mesne*
profits are.

These *mesne* profits are the value of the premises during the time that the lessor of the plaintiff has been illegally kept out of possession of his estate, by the defendant.

From what
time plaintiff
entitled to
them.

He is entitled to them not merely from the time of the demise laid in the declaration of ejectment, but from the time that his title accrued. Bull. Ni. Pri. 87.

For although he may not have been in actual possession all that time, no real entry having in the first instance been made by him; yet such entry when made had relation to the time when the title accrued. *Stonyhaugh v. Causins*, 2 Bar. 367. *Espin*. 494.

How barred by
statute of li-
mitations.

But as this is a mere action of trespass, he can never recover more than six years, if defendant pleads the statute of limitations. Bull. Ni. Pri. 88.

Of the proofs in
this action.

There is however a difference in the nature of the proof, according to the time for which the plaintiff goes for the *mesne* profits. If he goes only for the time from the demise laid, the record of the recovery in ejectment is conclusive evidence of the plaintiff's title; so that he need only produce the judgment in ejectment and writ of possession executed, and he will be entitled to recover; but if he goes for time before the

the demise laid in the declaration, the defendant is at liberty to controvert his title; so against a precedent occupier, the record is no evidence, and therefore against him the plaintiff must shew and prove a title. Bull. Ni. Pri. 87. *Astin v. Parker*, 2 Burr. 667. 1 Sid. 239. Str. 960.

For this reason it is the best way to lay the demise in the declaration, as near to the time when plaintiff's title accrued, as can be done with safety.

Neither as to the length of time the tenant has occupied, nor as to the value, is the judgment in ejectment any proof; therefore they must be proved in this action.

Nor is the jury confined to give merely the value of the *mesne* profits; they may take into consideration the plaintiff's trouble, &c. and give what damages they think proper. 3 Will. 198.

The judgment in ejectment by default is of the same effect in this case, as if it had been after verdict; the only difference seems to be in the proof, that in the former case plaintiff should produce not only the judgment but the writ of possession executed; whereas in the latter the judgment only is sufficient. 2 Bur. 666. 3 Will. 119. Str. 960.

This action may be brought in the name either of the nominal plaintiff or his lessor, against the tenants in possession, whether he be made a party to the ejectment, or suffers judgment by default. *Astin v. Parker*, 2 Burr. 667.

But if brought in the name of the former, the court on application will stay the proceedings till security is given for the costs. *Pike v. Corbin*, Say. 78. Nor can plaintiff go for the *mesne* profits beyond the time of the demise laid in declaration.

Defendant may be held to bail in this action. See Vol. I. p. 43.

The defendant cannot pay money into court in this action. *Holdfast v. Morris*, 2 Will. 115.

In an action for *mesne* profits the parcels must be mentioned, or plaintiff may plead the common bar.

If one tenant in common recovers in ejectment against another, he may have trespass for the *mesne* profits. 3 Will. 118.

After judgment by default, the costs in the ejectment are recoverable, and usually declared for, as damages in the action for *mesne* profits. 3 Will. 121. Bull. Ni. Pri. 88.

After verdict, the costs are taxed and enforced by attachment, as *ante*.

But where defendant became bankrupt after the judgment in ejectment by default, and before the action brought for

Jury not confined to the mere value.

In whose name this action may be brought.

How if by the nominal plaintiff.

Defendant may be held to bail.

Cannot pay money into court.

Parcels must be mentioned.

How if brought by tenant in common.

Costs of ejectment recoverable by it.

(A)

How if jury has not included them, and defendant is a bankrupt.

mesne

mesne profits, and having suffered judgment by default in the latter action also, the jury on the writ of inquiry did not include the costs of the ejectment; court on motion refused to set aside inquisition, saying, plaintiff might have had another remedy; the costs were a liquidated debt, and he might have proved them under the commission. *Gulliver v. Drinkwater*, 2 D. & E. 261.

Bankruptcy no bar to this action.

It may be brought pending a writ of error.

How if defendant bring error, and is nonsuited.

Bankruptcy is no bar to an action for *mesne profits*; as it is a demand for a tort. *Goodtitle v. North*, Doug. 584.

This action may be brought pending a writ of error in ejectment, and plaintiff may proceed to ascertain his damages, and to sign his judgment; but the court will stay execution till the writ of error be determined. *Harris v. Allen*, Cook. 46.

If in ejectment there is a verdict for plaintiff, and defendant bring error, and enters into recognizance to pay costs in case of *nonsuit*, &c. pursuant to the statute of Charles the Second; and he be nonsuited, &c. defendant in error need not bring a *scire facias*, or *debt* on the recognizance, but may sue out an *elegit*, or *writ of inquiry*, to recover the *mesne profits* since the first judgment in ejectment. *Short v. Heath*, Mich. 12 G. 2. 2 Crompt. 223.

If the plaintiff in an action for *mesne profits*, recover less than 40s. and the judge do not certify that the title came in question, the plaintiff is entitled to no more costs than damages. *Doe v. Davis*, 6 D. & E. 593.

SECTION V.

General Observations on Proceedings in Ejectment.

(A) Of amending Proceedings in Ejectment.

(B) Of consolidating Declarations.

(C) Of bringing a new or second Ejectment, and staying Proceedings till Costs of first are paid.

(D) Of Security for Costs in other Cases in Ejectment.

(E) Of quieting Plaintiff in his Possession after Judgment and Execution in Ejectment.

(A) (A) Of amending Proceedings.

Of amending the declaration.

It is a rule in both courts that no declaration in ejectment can be amended before appearance, and that after appearance

ance it can only be amended in form, not in matter of substance. *Roe dem. Stevenson v. Doe*, Bar. 186.

But amendments are now carried further than formerly, and that which used to be deemed substance, (as the demise, &c.) is now held matter of form and amendable.

Thus where the ejectment was to avoid a fine, and the demise laid *before* plaintiff had made the entry, instead of *after*, it was on motion ordered to be amended; and, *per* Lord Mansfield, the demise is mere matter of form, it does not exist. *Hardbam v. Pilkington*, 4 Burr. 2447.

So the term was ordered to be enlarged, after it had expired twelve years, though the cause was at issue, and special jury struck, and the parties gone down to trial, before the mistake was discovered. *Roe dem. Lee v. Ellis*, 2 Black. Rep. 940. See also *Vicars v. Haydon*, Cowp. 841.

So, an amendment was made in the parcels, and in the name of plaintiff for the defendant. *Williams v. Barclay*, P. R. 16.

The court permitted an amendment to be made in the notice at the bottom of declaration, by altering the time for tenants to appear, although the statute of limitations would have attached had the proceedings been quashed. *Doe v. Roe*, 7 D. & E. 469.

The *postea* may be amended by the judges' notes at any time, even after final judgment and writ of error brought. *Church v. Perkins*, 3 D. & E. 749.

Of amending
the postea.

Though it used to be held that such amendment could not be made after a term had elapsed. Doug. 703.

When the verdict may be amended by the judges' notes, see Vol. I. p. 499.

Of amending
the verdict.

After verdict, if the objection be founded on the mere mistake of the clerk, or a trifling nicety, there is no need of any actual amendment, the court will overlook the objection. *Small dem. Baker v. Cole*, 2 Burr. 1152. 4 Burr. 2447.

(B) Of consolidating Declarations.

(B)

On motion in C. B. to consolidate *sixteen ejectments* in one, after sixteen several issues joined, and though it was urged for the plaintiff, that the issues were delivered and paid for a long time ago, the court held, that it was necessary for the defendants to pay for the issues to prevent judgment, and ordered the ejectments to be consolidated.

N. B. Each declaration contained a large number of messuages, and they were word for word the same. Had each been for one messuage only, the plaintiff might have tried them separately. *Barnes*, 176. *Grimstone v. Burghers*.

And this distinction (though I think very unsatisfactory) seems at that time to have been observed; for where ten declarations on the same demise were delivered for ten houses in Steyning in Sussex, in the occupation of *ten persons*, and on motion to consolidate them, and put them all in one issue, upon suggestion that the title was the same in all, the court refused it; for they said the lessor might have sued them at ten different times, and it would be obliging him to go on against all, when perhaps he might be ready in some of them only. Stra. 1149, *Smith v. Crabb*.

But the courts at this time will not endure such a multiplicity of suits.

In the case of *Doe dem. Pultney and others v. Freeman and others*, Trin. 1790. on a rule to shew cause why the proceedings in all the causes (which were thirty-seven in number brought against the several inhabitants of the houses in Backville-street) should not be stayed and abide the event of a special verdict, in *Doe dem. Pultney v. Caven*; Lord Kenyon said, it was a scandalous proceeding, they all depended precisely on the same title, and ought all to be tried by the same record. Rule absolute. See also *Cecil v. Brigger*, 2 D. & E. 639.

(C) (C) Of bringing a new or second Ejectment, and staying Proceedings till Costs of first are paid.

It may be remembered that a judgment in ejectment is a mere recovery of the possession without prejudice to the right: it is not final between the parties so as to protect either the defendant or plaintiff (if he succeeds) from any further suit.

Same plaintiff may bring fresh ejectment against same defendant, and so vice versa.

The same plaintiff (if he be nonsuited, or have a verdict against him) may bring another ejectment against the same defendant, or if he succeeds in the action and gets possession, he is still liable to an ejectment from the defendant in the former action.

This in one respect may be deemed an advantage, because the parties are not concluded by one trial, in case the real merits (from accident, partiality, want of evidence, which might afterwards be supplied, or the like) happened not to have been fairly tried between them; but in another respect, much mischief may result from it. The spirit of litigation is thereby kept alive, and the successful party may be constantly harassed by the attacks of his opponent.

No remedy in equity.

It has sometimes indeed been attempted in Chancery, after three or four ejectments, by a *bill of peace* to establish the prevailing

prevailing party's title, yet it hath always been denied, for every *termor* may have an ejectment, and every ejectment supposes a new demise, and the costs in ejectment are a recompence for the trouble and expence to which the possessor is put. But where the suit begins in Chancery for relief touching pretended incumbrances on the title of lands, and the court has ordered the defendant to pursue an ejectment at law, there, after one or two ejectments tried, and the right settled to the satisfaction of the court, the court hath ordered a *perpetual injunction* against the defendant, because there the suit is first attached in that court, and never began at law; and such precedent incumbrances appearing to be fraudulent, and inequitable against the possession, it is within the compass of the court to relieve against it.

As the costs of the ejectment are deemed the recompence as above stated, (though in truth but a poor one,) the courts will not suffer either the plaintiff to bring a new ejectment, or the defendant to bring the ejectment against the successful plaintiff, until the costs of the former action are paid.

The remedy to enforce the payment of costs after verdict is by attachment; and as one court cannot strictly take cognizance of the rules of another, it used to be held that a new ejectment brought in B. R. the former having been in C. B. the court of K. B. could not stay proceedings therein, though the costs of the former action in C. B. were not paid. But this is no longer a subterfuge.

The courts now consider a former ejectment in another court, as one in the same court, and will stay proceedings in a second, till the costs of the former are paid. Bar. 133. *Holdfast* dem. *Hattersley* v. *Jackson*. *Doe* dem. *Chadwick* v. *Law*, 2 Blac. 1158. *Lord Conynby's Case*, Str. 548.

So, though in such former ejectment the lessor of plaintiff never entered into the consent rule. *Smith* v. *Barnardiston*, 2 Blac. 904.

So if plaintiff was nonsuited in former ejectment. *Angel* v. *Angel*, 6 D. & E. 710.

Or if the present plaintiff was defendant in former ejectment and evicted, but had not paid costs. *Thrustout* v. *Holdfast*, 6 D. & E. 223.

For the main point in all these cases is, if the premises are the same, and the same title in effect to be tried, though the names of plaintiff or defendant be different.

So, when an ejectment was brought by a fraudulent assignee of an insolvent debtor, the former lessor of plaintiff. *Doe* dem. *Chambers* v. *Law*, 2 Blac. 1180.

So, proceeding stayed in error and a second ejectment, plaintiff not being able to shew that the writ of error was

Proceedings stayed till costs of first action paid.

Formerly this could not be done if second action brought in another court.

But now there is no difference.

To what cases it extends.

Not where plaintiff is in custody or attachment for the costs.

How where action is abandoned for a mistake therein, and a new one brought.

What defendant must do, before he can bring his ejectment against plaintiff.

When plaintiff may discontinue after special verdict.

(D)

Three instances only where court orders security for costs.

brought with any other view than to delay payment of costs. *Str. 554. Crumble v. Bodilly.*

But where the lessor of plaintiff has been taken in custody upon an attachment for costs, which is in the nature of a *ca. sa.* there is no reason to grant the rule to stay proceedings in another action brought by the same lessor on the same demise. *Benn. dem. Mortimer v. Denn, Bar. 180.*

But where before trial, a mistake is discovered, so as to render it necessary to serve a new ejectment, the court will not stay proceedings till costs of first are paid, unless the party has been vexatious, or great expence incurred; but if the lessor of plaintiff be not known, court will order notice to be given where they may be found. *Short v. King, Str. 681. Thrustout and Troublesome, Str. 1099. Brittain v. Grenville, Ibid. 1121.* So, if he abandons his suit in one court and brings a new action in another. *Selby v. Alston, 1 D. & E. 491.*

Proceedings in a second ejectment were stayed till the special verdict in the former was determined. *Str. 1105.*

When the plaintiff succeeds in an ejectment, the defendant cannot bring in a new ejectment against him, until he has given up possession to the plaintiff, or the tenants in possession have attorned to him. *Fenwick v. Grosvenor, Salk. 258.*

And I conceive, (upon the principle of the above cases,) until he has also paid the costs of the former ejectment. See *Running Eject. 420. (edit. 1795.)*

The court will not give plaintiff leave to discontinue after a special verdict has been had, in order to adduce fresh proof in contradiction to the verdict. *Rog. dem. Fray v. Fray, 2 Blac. 815.*

(D) Of Security for Costs in other Cases in Ejectment.

There are only three instances in which the court will interfere on behalf of the defendant, to oblige plaintiff to give security for costs. The first is when an infant sues, then the court will oblige the *prochein ami*, or guardian or attorney, to give such security. 2dly, Where the plaintiff resides abroad: even residing in Ireland held sufficient. *2 Burr. 1177.* And 3dly, Where there has been a former ejectment, as treated of *ante (C)*, the court there staying proceedings till costs are paid. *Selby v. Alston, 1 D. & E. 491. 2 D. & E. 511.*

(E) Of

(E) Of quieting Plaintiff and relieving him when his Possession is disturbed after Execution executed.

The writ of execution in ejectment is only returnable at the instance and election of the plaintiff, for the court will not direct the writ to be returned at the instance of the defendant; which seems to be left to the choice of the plaintiff, that he may take what is most for his advantage, in order to have the full benefit of his judgment: and the way to that is, to suffer him to renew the execution at his pleasure, till a new execution be had; but he cannot renew execution after he has once procured the writ of possession to be returned and filed; because it then appears on record, that the plaintiff hath had the benefit of his suit, and then to award a new execution would be *actum agere*, and consequently superfluous; and therefore the court will never oblige the sheriff to make a return, but at the plaintiff's desire. Roll. Abr. 386. 2 Keb. 245. Roll. Rep. 353. Id. Raym. 252. 346. 482. 718. 725. 1072. Carth. 496. Salk. 260. pl. 1. 5 Mod. 443.

If the writ is once returned, though not filed, it seems, no new *habere facias* shall issue, because when the return is made it becomes a record, which the court then is entitled to. 2 Brown. 216.

When the writ is not returned, in order for a new writ, there must be a suggestion, that *vicecomes non misit breve*; but this new writ cannot issue, till the return of the first writ is out; because till that return is past, *non constat* to the court, but that the sheriff may do his duty, and the plaintiff thereby have the full benefit of his judgment, and so no new writ is necessary. Palm. 289.

The writ is not executed, nor the execution complete, till the sheriff and his officers are gone, and the plaintiff left in quiet possession. If the officer is disturbed in the execution of the writ, on affidavit thereof, the court will grant an attachment against the party, whether the defendant or a stranger, because the writ is the process of the court, and the disturbance is a contempt of its authority. 6 Mod. 27. *Kinsale v. Mann*.

But after possession once given, and a disturbance thereof, the law makes a difference where the plaintiff is turned out by the defendant himself, and where by a stranger: If by the defendant and the writ not returned, the plaintiff may have a new *habere facias* or an attachment, because the defendant himself shall never keep that possession, which the plaintiff is entitled to, and has recovered by due course of

law; but if he is turned out by a stranger after execution executed, the plaintiff is put to his new action upon an indictment of *forcible entry*, where the force will be punished, because the title was never tried between the plaintiff and a stranger; and the stranger may claim the land by title paramount the plaintiff, or he may come in under him; and then the recovery and execution in the former action ought not to hinder the stranger from keeping that possession which he may have a right to; and if the law were otherwise, a plaintiff, by virtue of an *habere facias*, might turn out his own tenant, who came in after execution executed; whereas the possession was given him against the defendant only, and not against others not party to the suit. *Ratcliffe v. Tate*, Keb. 479. 1 Salk. 321. *Perkins v. Woolaston*.

In the case of *Fortune and Johnson*, on motion for an attachment against Johnson, for ejecting the plaintiff, who had been put into possession by *habere facias*, the court made no rule, because it appeared that Johnson claimed under an elder judgment, and it was title against title, and therefore left them to take their course at law. *Style*, 318.

The plaintiff had judgment, but, by agreement afterwards, the defendant was to hold for the residue of his term, and accordingly held for some time; then the plaintiff took out an *habere facias*, and executed it: upon which the defendant moved for restitution on the agreement, which the court refused, and left him to his action on the agreement, for the judgment was ruled absolutely. But if the judgment had been with a *cesset executio* till such a time, then if the plaintiff takes out execution within the time, the defendant shall have restitution, because the judgment was entered with the limitation. *Style*, 408. *Law of Eject.* 113. *Ward v. Markham*.

But *quære*, how does this appear to the court, since it seems a *cesset executio* is never entered on the roll? The difference seems to be between a judgment by *confession*, and on verdict, where the former is given with a *cesset executio*; and there, if the execution is taken out contrary to the agreement, the court will set it aside, and punish the attorney: but where judgment is given on *verdict*, the verdict is the foot and ground of the judgment, and the court will not take notice of agreements between the parties, but leave them to their remedy. 1 Sid. 379.

This used to be the distinction, but the courts will now relieve in a summary way, upon such agreements. See *ante*, Ch. xiv. Sec. ii and iii.

II. Of

II. Of Penal Actions.

By stat, 21 Jac. 1. c. 4. it is enacted, "that all offences hereafter to be committed against any penal statute for which any common informer or promoter may lawfully ground any popular action, bill, plaint, suit, or information before justices of assize, of *nisi prius*, of gaol delivery, of oyer and terminer, or justices of the peace, shall be commenced, sued, and prosecuted, &c. before them, and not at the courts of Westminster;" and by the same statute an affidavit must be filed, that the offence was committed in the county where the action is brought, and within a year before the bringing of it;

In what courts to be brought.

Stat. 21 Jac. 1.

Of the affidavit required by that statute.

Upon this statute objections have been made in one or two late cases, to the action being brought in the superior courts, and also to the want of such affidavit. But it is now determined that the above statute only extends to such cases, where, before that time, the penalty might have been recovered in the inferior as well as the superior courts, by action, bill, plaint, suit, or information. So that, wherever by any act then in force, the informer might have sued by action, bill, plaint, or information in the inferior courts as well as in the courts at Westminster, he is confined to sue in the former; but as that statute gives no new jurisdiction to the inferior courts, the party may still sue in the courts at Westminster for all those penalties which could not, before the passing of that statute, have been recovered in the inferior ones. *Shipman v. Herbert*, 4 D. & E. 116.

Construction of the above statute.

When an offence is created by statute under a penalty, the penalty may be sued for in the superior courts at Westminster, unless ousted of its jurisdiction by express words, or by necessary implication. *Cotes v. Knight*, 3 D. & E. 444.

So, as to the affidavit ordered by the same statute, it only applies where the party sues before the justices, &c. according to that statute. There is no occasion for it in an action in the courts above; notwithstanding the case of *White v. Boot*, 2 D. & E. 274., which has since been held not law in *Leigh v. Kent*, 3 D. & E. 364.

By 31 Eliz. c. 5. actions on penal statutes must be brought within a year from the time of committing the offence; but this does not extend to an action given by statute to the party grieved.

When penal actions to be brought.

In what cases the defendant may be held to bail in penal or popular actions, see Vol. I. Ch. iv. (A. 5), and also of the affidavit to hold to bail on the lottery act, see Vol. I. Ch. iv. Sec. i. (A. 2, 3).

Proceedings therein.

The proceedings in penal or popular actions from the declaration to judgment, are the same as in common cases, for which see under the different heads.

Of the plea of
not guilty.

If not guilty is pleaded to an action of debt on a penal statute, it is not such a nullity as warrants judgment to be signed for want of a plea; indeed it is doubtful whether it is not a good plea. *Coppin v. Carter*, 1 D. & E. 462.

Of pleading
double.

The defendant in a penal action cannot plead double; the statute 4 Ann. c. 16. peremptorily forbidding it. *Heyrick v. Fester*, 4 D. & E. 701.

A discontinuance is cured by the appearance of the party by stat. 32 H. 8. c. 30. in penal as well as civil actions. *Humble v. Bland*, 6 D. & E. 255.

It is not a cause of error to enter a judgment of *misericordia* instead of a *capiatur* in a *qui tam* action for a penalty. *Ibid.*

If there is reason to think that the action on a penal statute is carried on merely for the issue money, it will be ordered to be paid into court to abide the event.

Of costs.

In penal actions no costs are allowed; but if the action be brought by the party grieved, he is entitled to costs: wherever therefore a statute gives accumulative damages to the party grieved, it is not a penal action. *Woodgate v. Knatchbull*, 2 D. & E. 154.

If the jury find a verdict for plaintiff with one penalty generally, and plaintiff apply it to one count, he cannot afterwards apply it to another, though the former is bad in law, and though the evidence would have warranted the verdict on any other. *Holloway v. Bennet*, 3 D. & E. 448.

New trial.

The courts never grant a new trial in penal actions, except upon the ground of misdirection of the judge; *Wilson v. Rastal*, 4 D. & E. 753; in which case they will. *Calcraft v. Gibbs*, 5 D. & E. 19.

Amending pro-
ceedings.

In amendments at common law there is no distinction between penal and civil actions. So that whilst the proceedings are in paper, the courts will allow the one as well as the other. But as it is a discretionary power in the court, they will exercise it with proper caution. If therefore upon such an application it appears that a great length of time has elapsed, (as four years since the action brought,) so that if a new action were commenced, defendant might plead the statute of limitations, the court will not permit plaintiff to amend. *Goff v. Popplewell*, 2 D. & E. 707. *Steel v. Sowerby*, 6 D. & E. 171.

But such amendment will be permitted even after the time limited for bringing another action, provided the plaintiff has not been guilty of any unnecessary delay in prosecuting his suit,

suit, and the amendment prayed for does not introduce any new substantive cause of action. *Maddock v. Sir B. Hammet*, 7 D. & E. 55. *Cross v. Kaye*, 6 D. & E. 542.

So upon application to the Master of the Rolls, an original may be obtained in penal actions to substantiate the proceedings had without them. *Ibid.*

No person can be prosecuted twice for the same offence. It used formerly, therefore, to be a common practice, when any one had offended against a statute and was apprehensive of an action, for him to procure some friend to commence a suit against him, in order to forestall others, and then to suffer judgment secretly and plead such judgment recovered; but to prevent this practice and fraud upon the king, who was thereby often deprived of his moiety of the penalty, the statute 4 Hen. 7. c. 20. enacts, that no recovery otherwise than by verdict, obtained by collusion, in an action popular, shall be a bar to any other action prosecuted *bona fide*, so that a judgment or verdict must be obtained to render such amicable suit effectual.

When a defendant is conscious of being guilty of the offence for which the action is brought against him, it is often the most prudent way to compound upon the best terms he can.

Of compounding Penal Actions.

In common actions the parties may compromise upon such terms at they think fit; but in penal and *qui tam* actions they can only compound by leave of the court.

For by stat. 18 Eliz. c. 5. s. 3. no informer shall compound or agree with persons that shall offend against any penal statute for an offence committed, but after answer made in court unto the information or suit; nor after answer but by order of the court, on pain upon conviction of standing on the pillory, being disabled to sue on any popular statute, and forfeiting 10/.

By sec. 6. the act is not to restrain any certain person, body politic or corporate to whom or to whose use any forfeiture, penalty, or suit is or shall be specially limited or granted by virtue of any statute, and not generally to any person that will sue.

So that the statute only extends to suits by common informers, not to those by a party grieved. 2 Haw. 279.

It is in the discretion of the court to give leave to compound, which they will exercise according to the nature and exigency of the case.

Of friendly prosecutions.

Of compounding.

Stat. 18 Eliz.

Exception therein.

To whom it extends, Discretionary power in the court.

How exercised, It was refused in an action for making and selling gold rings of less fineness than statute direct. *Howell v. Morris*, 1 Wil. 79.

When leave granted, Granted upon the statute of gaming, on affidavit that plaintiff was a bankrupt, and that the assignees were satisfied with respect to defendant. 1 Wil. 130.

Granted in an action on the post-horse act, upon payment of 40s. to the crown, and the deficient duties and costs (which the act gives) to the prosecutor, although together they amounted to no more than 40s. 1 P. & B. 51.

So on an affidavit of defendant's poverty. *Bradshaw v. Mottram*, 6 Str. 167.

When not, But where the sum agreed to be paid is so small as to appear manifestly collusive, court will refuse. *Wood v. Cassin*, Blac. 1157.

Court refused when the nature of the offence was such as they thought required a public investigation, as in an action for keeping an unlicensed music room contrary to the statute.

Granted after verdict. And this motion may be made and leave granted after verdict; *Moyhan v. Walker*, 3 D. & E. 98; or when defendant is in execution. Str. 167.

But in such cases, the defendant must shew circumstances which entitle him to such an indulgence, or the court will refuse. *Crowder v. Wapstaf*, 1 P. & B. 18.

Effect of rule to compound when obtained. If a defendant in a penal action obtain a rule with plaintiff's consent to stay proceedings on paying a sum agreed upon between him and plaintiff, it is an absolute undertaking to pay that sum, (not optional to pay or to proceed in the action,) and for the non-payment of it, the court will grant an attachment. *King qui tam v. Clifton*, 5 D. & E. 257.

Must be by consent. In all cases of compounding, it must be with consent of both parties.

How to proceed. It is done by motion in court, grounded upon an affidavit of one of the parties, that an action is brought upon such an act, that declaration contains penalties to such an amount, that since defendant has pleaded *nil debet*, and that plaintiff and defendant have agreed to compound the same for ten pounds, and that no more is given or taken, nor is it compounded in any other way than by leave of the court.

Counsel must move it, and another brief must be given to another counsel to consent. The king's half of the penalty must be paid into the hands of the master of the Crown-office, before the rule is drawn up.

In C. B. the king's share must be paid to prothonotary, and his receipt obtained before the motion to compound is made. Burr. 1929. Blac. 1157.

Draw up rule with clerk of rules in K. B. and secondary in C. B. and serve copy on the attorney of the other side.

Whereas inconveniences have arisen from the mode heretofore practised of granting rules to compound, whereby the defendant hath often evaded or delayed to pay the composition money,

It is therefore ordered, That in future every rule to be drawn up for compounding any *qui tam* action do express therein, that the defendant doth thereby undertake to pay the sum for which the court hath given him leave to compound such action. R. East. T. 33 Geo. 3. K. B.

III. Of Replevin.

SEC. 1. *Of the Nature of the Action, and by whom and in what Court to be brought.*

SEC. 2. *Of the Proceedings therein when the Distress is not for Rent.*

SEC. 3. *Of the Proceedings when the Distress is for Rent.*

SEC. 4. *Of the Remedy in both Cases when the Pledges are insufficient.*

SEC. 5. *Of the Non Pros, Nonsuit, Verdict, and Judgment, in both Cases.*

SECTION I.

Of the Nature of the Action of Replevin, and by whom and in what Court to be brought.

Replevin is a remedy grounded upon a distress; for goods are only replevifable when they have been taken by way of distress. Replevin what:

It is a re-deliverance of the goods or cattle distrained to the first possessor, on security given by him to try the right, and again to return the things distrained, if judgment be eventually given against him. Co. Litt. 145.

The old common law way of proceeding was by writ of replevin; but as much delay and inconvenience was occasioned thereby, the statute of Marlbridge, 52 Hen. 3. empowers the sheriff of the county immediately, upon complaint

Of the common law proceedings altered by statute.

plaint made to him, to replevy the goods without any such writ.

Modern practice.

The usual practice, therefore, now is, to proceed by plaint in the county court; and it is not necessary for the plaintiff to stay till the county court is held, before he makes plaint, provided it be afterwards entered there; and upon plaint made to the sheriff of goods or cattle distrained, he by parol or precept may, by his bailiff, replevy them; 12 Inst. 193; and this, though they be above the value of 40 s.

Of statute 1 P. & M.

“For the more speedy delivery of cattle distrained, the sheriff (by statute 1 & 2 P. & M. c. 12.) must appoint four deputies at least in his bailiwick, dwelling not above twelve miles one from the other, to make replevins, who have authority in his name so to do.”

Two sorts of action.

The action of *replevin* is of two sorts; 1. in the *detinet*; 2. in the *detinuit*; and may be brought in any case where a man has his goods and cattle taken from him by another, by way of *distress*.

In the *detinet* and *detinuit*.

Where the party has had his goods re-delivered to him by the sheriff upon a writ of replevin, or upon a *plaint* levied before him, the action is in the *detinuit*; *wherefore he detained the goods, &c.*; but where the sheriff has not made such replevin, but the distrainer still keeps possession, the action is in the *detinet*; *wherefore he detains the goods, &c.* However, of late years, no action has been brought in the *detinet*, though there is much curious learning in the old books concerning it.

The former fallen into disuse.

Why.

The advantage the plaintiff has in bringing an action of replevin in the *detinet*, instead of an action of trespass *de bonis asportatis*, is, that he can oblige the defendant to re-deliver the goods to him immediately, in case upon making his avowry they appear to be repleviable; but as he may more speedily have them delivered immediately after they are distrained, by application to the sheriff, the action in the *detinet* has fallen into disuse, and is never brought, unless the distrainer has esloined the goods, so that the sheriff cannot get at them to make replevin; and then it may be brought in the *detinet*: whereupon after avowry made, the plaintiff may pray that the defendant gage deliverance; or he may, upon the return of *elongavit* to the *pluries writ of replevin*, have a writ to the sheriff, commanding him to take other beasts, &c. of the defendant's in *withernam*; but then, if the defendant, before the return of the *withernam*, appears to the writ of replevin, and offers to plead *non cepit*, it shall stay the *withernam*; for the defendant shall not be concluded by the return of the *elongavit*, because the sheriff can make no other return where he cannot find the thing to be replevied.

The

The word *withernam* is a term which signifies a second or reciprocal distress, in lieu of the first, which was essoined. The writ of *capias in withernam*, is a writ therefore to the sheriff, commanding him to take other goods, &c. of the distrainers, in lieu of the distress formerly taken and essoined or withheld from the owner. So that here is now distress against distress, the one being taken to answer the other by way of reprisal, and as a punishment for the illegal behaviour of the original distrainer. For which reason goods taken in *withernam* cannot be replevied till the original distress is forthcoming. *Ld. Raym. 475.*

Of the withernam.

If the person taking the goods claims property in them before the sheriff, he cannot make replevin of them: but then the plaintiff may sue out a writ *de proprietate probanda*, upon which the sheriff must have an inquest of office; and if, upon such inquisition, the property is found in the plaintiff, the sheriff shall make replevin; otherwise not. But though the property is not found in the plaintiff, he is not concluded, for he may still have his action of replevin in the *detinet*, or of trespass. But if in an action of replevin the defendant *plead property*, and it be found for him, the plaintiff is thereby concluded.

How if property is claimed in the goods. Of the writ de proprietate probanda.

Therefore he that brings a replevin must have an absolute, or at least a special, property in the thing distrained; so that several men cannot join in a replevin, unless they be joint-tenants, or tenants in common. *Co. Lit. 145.*

Who may bring replevin.

Executors may have a replevin of a taking *in vita testatoris*; for this affirms the property to remain. *Bro. Rep. 59. Sid. 82.*

Executors.

So if the cattle or goods of a feme sole be taken, and she afterwards intermarry, the husband alone may have replevin; but if they join, and there be a verdict for them, judgment will not be arrested, because the court will presume them jointly interested (as they may, if a distress be taken of goods, of which a man and a woman were joint-tenants, and afterwards intermarry): the avowry admitting the property to be in the manner it is laid. *Bull. Ni. Pri. 53.*

Feme sole.

When an act of parliament orders a distress and sale of goods, this is in nature of an execution, and *replevin* does not lie.

No replevin for distress under a statute.

The usual place and method of commencing an action of replevin is in the *county-court* by *plaint* (this being the most expeditious mode of getting back the goods distrained, as abovementioned).

Where and how to be brought.

But it may be brought either in the K. B. or C. B. by writ returnable therein. So, by special custom in an *hundred court*,

court,

court, or other court of record that may hold plea thereof. Salk. 580. 2 Inst. 139. 3 Mod. 56.

Or in the county-court by writ, which was formerly the only way the sheriff could replevy, till the statute of Marlbridge gave the plaintiff. Ld. Raym. 219.

How if freehold comes in question;

But though the sheriff may grant *replevins* by *plaint*, and proceed thereon in the county-court, yet if any thing touching the *freehold* come in question, or ancient *demesne* be pleaded, the sheriff can proceed no further: nor can any such proceedings be carried on in the hundred court, court-baron, or any other court claiming a jurisdiction herein by prescription. 4 Hen. 6. 30. 2 Hen. 7. 6. Co. Lit. 145.

or the king is party.

So when the king is party, or the taking is in right of the crown, the sheriff is to surcease. Bro. Rep. pl. 3. Brown, 33.

Of the proceedings by writ in county-court.

Although the proceeding by writ in the county-court is very unusual, yet it may not be improper to give a brief account of it.

If the replevin is by writ there, the writ issues out of Chancery, and is in the nature of a *justicies*. 2 Inst. 240.

And if the sheriff does not return it, or does nothing upon it, the plaintiff may have an *alias*, in which is inserted usually this clause, that he make replevin, *vel causam nobis significet*; F. N. B. 68. e.; and after that a *pluries*.

If the sheriff makes replevin, he need not return the writ; but if he does not, he ought to return the cause. 2 H. 7. 5. b.

And if he does not, an attachment lies against him to the coroners, commanding them to attach the sheriff for his contempt, and in the interim make replevin. Reg. 81.

To any of these writs, the sheriff cannot return a *mandavi ballivo*, &c.; for by Westm. 1. 17. the sheriff ought immediately to enter the franchise, and make deliverance. F. N. B. 58. f.

If he does not replevy, and makes any other return, the plaintiff shall have a *capias in withernam*; and after that, an *alias*, and a *pluries capias in withernam*.

Replevin being a remedy grounded upon a distress, the proceedings therein differ according to the nature of the distress. By particular acts of parliament, various regulations are made, respecting distresses for rent and the action of replevin thereon, which do not apply to other cases. In the consideration, therefore, of this subject, it will be rendered more clear and intelligible, by shewing, 1st, the proceedings in replevin when the distress is not for rent; and, 2^{dly}, when the distress is for rent.

SECTION II.

Of the Proceedings in Replevin when the Distress is not for Rent.

(A) How and when to make Replevin, and of the Pledges.

(B) How if Cattle be eloiigned, and cannot be replevied, and of the Power of Sheriff in making Replevin.

(C) Of removing the Suit; and herein of the *Re. fa. lo.*

(D) Of the subsequent Proceedings, and compelling the adverse Party to proceed.

(E) Of the Writs of second Deliverance and Withernam.

(F) Of the Declaration and Pleadings in the Court above.

(A) How and when to make Replevin, and of the Pledges.

(A)

At common law, in all cases, a distress when made was holden merely as a *pledge*; it could not be sold nor disposed of. So it is now, except where the distress is for rent. (See next Sect. iii.) Whenever the person whose goods are taken as a distress, wishes to have them immediately again, *i. e.* to replevy them, (*replegiare*, to get the *pledge* back again) he may, upon application to the sheriff, have them restored: but he must first give *security* that he will *prosecute* his suit, (*i. e.* his action of replevin in order to try the legality of the distress,) and also that he will re-deliver the cattle or goods distrained, if judgment be against him.

Of the nature of a distress at common law.

What to be done on making replevin.

These pledges for prosecution of the suit, and for the return (*pro retorno habendo*), are ordered to be taken by stat. Westm. 2. c. 2. which enacts, "That sheriffs or bailiffs from thenceforth shall not only receive of the plaintiff pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return be awarded; and if any take pledges otherwise, he shall answer for the price of the beasts; " and

Of the pledges ordered by stat. Westm. 2.

“ and the lord that distrains shall have his recovery by writ,
“ that he shall restore to him so many beasts or cattle ; and
“ if the bailiff be not able to restore, his superior shall re-
“ store.”

How the sheriff makes replevin.

Upon plaint being made and pledges found, (as above-mentioned,) which is done at the sheriff's office, the sheriff or one of his deputies, by the stat. 1 & 2 P. & M. (see *ante*, Sect. i.) is to make replevin of the goods or cattle distrained, which is done by granting a warrant to the following effect :

**Of the warrant
for that purpose.**

" Bucks, to wit. A. B. esq. sheriff of the county afore-
said: To the bailiff of the hundred of Desborough, in
the said county; and also to John Thomas, and William
Jones, my bailiffs, and to every of them, greeting. For-
asmuch as C. D. hath found me sufficient security as well
to prosecute a suit against E. F. and G. H. for taking and
unjustly detaining of his cattle, goods, and chattels, to
wit, *one mare and four colts*, which the said E. F. and G. H.
have taken and unjustly detained, as is alleged; as also
for return thereof, if a return thereof should be adjudged;
therefore I command you, and every of you, jointly and
severally, that on the behalf of our lord the king, you re-
plevy, and cause to be delivered to the foresaid C. D. his
cattle, goods, and chattels aforesaid; and that the afore-
said E. F. and G. H. give or cause to be given sufficient
pledges, so that they may be and appear at the next coun-
ty-court to be holden at Aylesbury, in and for the county
of Bucks aforesaid, to answer the aforesaid C. D. in a plea
of taking and unjustly detaining of his cattle, goods, and
chattels aforesaid; and in what manner you shall execute
this precept certify to me at the said next county-court, to
be held at the time and place aforesaid, under the peril
incumbent. Given under the seal of my office this
day in the thirty-sixth year of the reign
of our sovereign lord George the Third, king of Great
Britain, &c. and in the year of our Lord 1795."

By John Dixon,
One of the replevinors appointed by
the said sheriff for the said county
of Bucks.

Of the time of making replevin.

There is no particular time when the replevin must be made, as the distress cannot be disposed of, but must only be kept as a pledge.

(B) How

(B) How if the Cattle or Goods are eloigned and cannot be replevied, and of the Power of the Sheriff in making Replevin.

(B)

If the bailiff return to the sheriff that he cannot have view of the cattle, &c. distrained to deliver them, the sheriff, by inquest of office, ought to inquire into the truth thereof; and if it be found by a jury, that the cattle are *eloigned*, the sheriff, in his county-court, may award a *withernam* to take defendant's cattle. And if he will not award a *withernam*, then the plaintiff may have a writ out of Chancery, directed to the sheriff, rehearsing the whole matter, and commanding him to award a *withernam*; and if the sheriff then neglects, the plaintiff may have an *alias* and *pluries*, and after that an attachment against the sheriff. F. N. B. 158.

If cattle, &c. eloigned, how to proceed by *withernam*.

But if the replevin be in a superior court by writ, and the sheriff returns an *elongata*, then the plaintiff must sue a *capias in withernam* out of the superior court, and pursue such writ there. It has been said before, that a *capias in withernam* is a term which signifies a reciprocal distress, in lieu of the first which is eloigned; and is a command to the sheriff, to take other goods of the distrainer in lieu of the distress by him taken and eloigned, or withheld from the owner. So that there is then distress against distress; one being taken to answer the other, by way of reprisal, and as a punishment for the illegal behaviour of the original distrainer: for which reason goods taken *in withernam* cannot be replevied till the original distress is forthcoming.

If a sheriff, in making replevin, be shewn a stranger's cattle or goods, and he takes them, trespass lies against him, for otherwise there would be no remedy; for being a stranger, he cannot have a writ *de proprietate probanda*. And were he not entitled to this remedy, it would be in the power of the sheriff to strip a man's house of his goods. 1 Roll. Abr. 552. Com. Rep. 596. But Kelway seems to hold that the action lies more properly against the person that shews the goods. Kelw. 119.

Sheriff not to take stranger's cattle, and how to satisfy himself thereon.

If the sheriff comes to make replevin of beasts impounded in another man's foil, and the place be inclosed, but has a gate open to the inclosure, he cannot break the inclosure and enter, where he may enter by the open gate. But if the owner hinders him, so that he cannot go by the open gate for fear of death, he may break the inclosure and enter there. 20 Hen. 6. 28. 2 Roll. Abr. 552.

Of the power of sheriff in making replevin.

In

In all cases of misbehaviour by the sheriff, or other officers, in relation to *replevins*, they are subject to the king's superior courts, and punishable by *attachment* for such misbehaviour.

(C) (C) Of removing the Suit from the County-Court; and herein of the *Re. fa. lo.*

Who may remove the plaintiff, &c.

The replevin remains before the sheriff, &c. though the goods and chattels, &c. distrained are above the value of 40s., for the replevin, *alias*, and *pluries*, are all vicontiel writs, 2 H. 7. 5. b., and the suit may be determined in such inferior court; but the suit may be removed by either of the parties into the courts of B. R. or C. B. to be there determined; and that without any cause shewn.

How to remove it.

The method to be pursued in moving it depends entirely on the manner in which the suit was commenced below.

By pone.

For if replevin be in the county-court by writ, it must be removed into B. R. or C. B. by *pone*. F. N. B. 69. m.

By recordari.

If in the county-court by *plaint*, it is removed by writ of *recordari facias loquelam* [commonly called a *resalo* for the sake of brevity]. F. N. B. 71. a.

By certiorari.

If replevin is in a court of record, that may hold plea in replevin, it must be removed by writ of *certiorari*, and can be removed in no other manner. 3 Mod. 56.—*Per King*, Ch. J. Hil. 3 Geo. 1. For a *resalo* does not go to a court of record, because there the suit is already recorded.

And if the plaintiff is in the court of another lord, it may be removed into B. R. or C. B. by *recordari* to the sheriff, commanding him *quod accedas ad curiam & in plena curia ill' recordari facias*, &c. F. N. B. 70. b.

But it is said, that a replevin shall not be removed out of a court, which is not the king's court, without cause, neither by the plaintiff, nor by the defendant; Reg. 85. b. 2 Inst. 339; for the prejudice that may come thereby to the lord.

Of the nature of the above writs.

All the above writs, to remove the suit from the inferior courts into B. R. or C. B. are in their nature *original writs*, and issue out of *Chancery*. But as the suit is most usually commenced in the county-court by *plaint*, and seldom or ever at this day by writ, I shall only shew the method of removing it when by *plaint*.

In order to remove it, the party makes out a *præcipe* to the *curfitor* of the proper county, in the following form:

Of the proceedings by resalo.

Bucks, to wit, Resalo for [either the plaintiff or defendant, naming him], of a plaint between C. D. and E. F. and G. H. for taking and unjustly detaining the cattle, goods, and chattels of the said C.

Returnable from Easter in fifteen days.

Upon

Upon delivery of this *precipe* to the *curfitor*, he makes out the writ, which must be carried to the under-sheriff of the county, who returns it of course.

[For the form of the writ of *refalo*, and the return, see the end of this Sec. ii.]

If the sheriff returns the *recordari*, *tardè*, the party shall have an *alias*, &c. F. N. B. 70. b.

By the *recordari* nothing is removed but the *plaint*, even though the issue should be joined below. F. N. B. 71. a. Gill. Replev. 113.

And the *plaint* may be removed, though the plaintiff has discontinued there. *Ibid.*

The *plaint*, when removed into B. R., is filed with the *filazer* of the county; as it is also when removed into C. B.

But upon removal of any other actions, except *replevin*, into C. B. the writ and proceedings are filed with the *prothonotary* there.

(D) Of the subsequent Proceedings, and of compelling the adverse Party to proceed.

(D)

If the plaintiff removes the *plaint*, he should, upon the return of the *refalo*, file it with the *plaint*, &c. with the *filazer* of the county, and search for defendant's appearance; if the defendant has not appeared on or before the appearance-day of the return of the *refalo*, the plaintiff should serve him with a rule to appear which may be had at *filazer*, and upon his non-appearance thereto sue out a *pone*. [See form the end of this Sec. ii.]

What may be done by plaintiff if he removes suit;

and defendant does not appear.

Of the *pone*.

The *pone* is got at *filazer's*; a summons is made out thereon at sheriff's office, and served upon the defendant by the officer. If no appearance is entered on or before the appearance-day of the return, get sheriff to return *nihil* on the *pone*, and sue out a *distringas* to be had at the *filazer's*; and proceed to levy thereon, as in Vol. I. p. 218, where proceedings are by *clausum fregit*; only the issues may be greater; the first may be 4 l., next 8 l., and so on. If defendant does not appear, proceed with *distringas ad infinitum*. If he does afterwards appear, he must pay the costs of the *distringas's*. Then declare *de novo*, not noticing the proceedings in the court below.

Distringas, &c.

Rules may be afterwards given to compel defendant to avow, and so on as in common actions.

But if the defendant removes it, he must file the *refalo* and return thereto with the *filazer*; and having entered an appearance,

What to be done by defendant if he removes the suit,

pearance, he must then give a rule for the plaintiff to declare; and for want of a declaration, when the rule is out, he may sign a *non pros* for not declaring, and immediately sue out a writ *pro retorno habendo*.

Of the filing the *resalo*.

If *resalo* not filed by the defendant on or before the appearance-day of the return of the *resalo*, notice must be given to plaintiff of the filing thereof by a demand in writing being made of declaration, before *non pros* can be signed; but if filed on the appearance-day of the return, such demand is not necessary. *Taylor v. Blaxland*, P. R. 370. *Cooke's Rep.* 55. *James v. Moody*, 1 H. Blac. 281.

How to compel plaintiff to declare.

If the plaintiff has removed the cause, and does not declare or proceed therein; or if the defendant has removed it, and after having served the plaintiff with a rule to declare, and demanded a declaration, the plaintiff does not declare and proceed therein, the defendant may sign a *non pros* and judgment *pro retorno habendo*, and then sue out a writ *pro retorno habendo*, which he may obtain of the *filazer*.

How to compel defendant to file *resalo*.

If the defendant has taken out the *recordari facias loquelam*, and does not get it returned and filed within two terms, the plaintiff should apply to the *filazer* for a certificate that the same is not returned and filed; which certificate, when obtained, is a sufficient warrant for the *curfitor* to make out a writ of *procedendo*, which remands the cause to the county-court to be there determined. [For form of writ, see the end of this Section ii.]

Of ruling sheriff to return *resalo*.

If the *resalo* is not returned by the sheriff, so as to enable the party to file it, you must rule him to return the writ; it is a four-day rule; if Sunday, the last day not reckoned. Whenever a *non pros* is signed, it is on a double half-crown stamp paper in the usual way.

(E) (E) Of Proceeding by Plaintiff by Writ of second Deliverance, and by Defendant by Writ of Withernam.

Writ of second deliverance, its use and nature.

If the plaintiff, after judgment of *non pros* signed, and writ of *retorno habendo* sued out by the defendant, would wish to go on in his suit, he is at liberty so to do; and his application for that purpose must be made to the *filazer* for a writ of *second deliverance*; which writ of *second deliverance* is in the nature of a *superfedeas* to the writ *pro retorno habendo*, if brought before it be executed.

How introduced.

At the common law, if the plaintiff in replevin had been nonsuited, either before or after verdict, the defendant who distrained had judgment for a return, but not *irreplevisable*:
fo

so that the plaintiff might have had as many replevins as he would, which was vexatious and mischievous. To remedy which, the statute Westm. 2. c. 2. restrains the plaintiff from having any more replevins after a nonsuit, but gives him a *writ of second deliverance*. 2 Inst. 340. [See form thereof at the end of this Section ii.]

And if after such *writ of second deliverance* the plaintiff is non-proffed, or becomes nonsuited, or the plea be discontinued, or the writ abates, or he prevails not in his suit, the defendant then shall have judgment for a return *irreplevisable*. 2 Inst. 341. So that now, whenever the defendant succeeds, the return must be *irreplevisable*. *Gamon v. Jones*, 4 D. & E. 510.

If on or before the appearance-day of the return-day of the *writ of second deliverance*, the plaintiff declares, the subsequent proceedings are the same as in other cases throughout the cause.

No *second deliverance* lies after a judgment on demurrer, or after a verdict, or confession of the avowry; but in all these cases, the judgment must be entered with a return *irreplevisable*. But upon a nonsuit either before or after evidence, where the distress was not for rent, a *writ of second deliverance* will lie, because there is no determination of the matter; and there a *writ of second deliverance* lies, to bring the matter in question: but in the case of a demurrer and verdict, the matter is determined by law; and in the case of a confession it is determined by the confession of the party. 2 Lill. Reg. 457.

If the plaintiff does not sue out a *writ of second deliverance*, and the sheriff should return to the *writ pro retorno habendo*, that the cattle, &c. were *eloined* or removed to places unknown, by reason of which he could not return the same to the defendant, as by the said writ he was commanded, then upon such return of *elongata*, the defendant shall have a *capias in withernam*, to be had of the *filazer*. [For form thereof, see the end of this Section ii.]

The writ of *withernam* is but *mesne process*. Ld. Raym. 614. Vide Comb. 201. 2 Salk. 582.

W. sued a replevin. H. removed it by *recordari* into the King's Bench; the plaintiff did not declare, and upon that a return was awarded to H., upon which the sheriff returns *averia elongata*, and then a *withernam* was awarded and executed; afterwards the plaintiff came and prayed that he might be admitted to declare; and also prayed a deliverance of the cattle taken in *withernam*: and it was testified by the clerks, that upon the plaintiff's submission to a *fine* for not declaring, and that being imposed upon him by the judges,

Does not lie after judgment on demurrer or verdict.

Writ of withernam, what.

Only mesne process.

Plaintiff may come in and declare, after withernam executed.

he shall have deliverance of the *withernam*: and a fine of 3 s. 4 d. being accordingly imposed on the plaintiff, he then declared, and had deliverance, Noy, 50. *Webb and Hind*; but said, that the course of B. R. is contrary to that of C. B.

Of the alias and pluries.

If the sheriff should return *nulla bona vel catalla ad valorem*, &c. to the writ of *withernam*, the defendant may sue out an *alias capias in withernam*, and after that a *pluries*.

(F) (F) Of the Declaration and Proceedings in the Court above.

When suit removed, plaintiff declares de novo.

The *refalo* being returned and appearance of defendant entered, plaintiff must declare *de novo*, nor need any notice be taken of the proceedings below; to the declaration defendant may plead in abatement or in bar, or he may avow in his own right, or make *confessance* in the right of another as his bailiff, or may justify, and the parties go on to issue or demurrer to be tried or argued, in the usual way.

Proceeding as in other cases.

Only either party may carry down record and no judgment, as in case of nonsuit.

But as both parties are actors in replevin, either of them may take down the record to trial, for which reason there can be no judgment as in a case of a nonsuit in replevin; and if the defendant gives notice of trial and does not proceed, court will give costs against him.

Observations on Declaration and Pleadings.

Of the venue.

The declaration in replevin may be laid in the county where the cattle or goods were taken, or in the county into which they were driven after the taking. F. N. B. 99. i.

Of the locus in quo.

And the declaration ought to be not only of a taking in a ville or town, but also in *quodam loco vocat*. But if the defendant would take advantage of his omission, he must demur to the declaration. Hob. 16. *Bullisthorp v. Turner*, C. B. Tr. 16 & 17 Geo. 2.

Of description of goods, &c.

The declaration must mention the cattle or goods demanded with such certainty, that the sheriff may make deliverance of them—and therefore it should mention the sorts or species, as sheep, cows, &c. Carth. 218.

If the cattle or goods are returned, the declaration should say, *wherefore he took, &c. and detained them against gages and pledges, until, &c.* 1 Saund. 347.

But if they are not returned, the declaration must be, *wherefore he took, &c. and still detains against gages and pledges.* Co. Ent. 610. b. Rast. Ent. 560.

So if only part are returned, it shall say as to that, *detained until, &c.* and as to the residue, *still detains.* Co. Ent. 611. b.

Attornment

Attornment since the stat. 4 Ann. c. 16. need not be averred in a declaration for rent, nor in an avowry. Doug. 283.

But if the defendant would take advantage of a variance in the place where the taking is laid, from that in which it really was, he must plead it in *abatement*. 6 Mod. 103.

For *prisal in auter lieu* must be pleaded in abatement, and cannot be pleaded in bar. Salk. 3. pl. 8. 2 Ld. Raym. 1016. Carth. 344. Show. 98. And because such plea concluded with a *petit judicium*, and a return which is in bar, it was held ill.

Of the plea of
*prisal in auter
lieu*.

If defendant pleads *prisal in auter lieu*, he must go on and make an avowry *pro retorno*: yet such avowry is only a suggestion to bring him within the stat. 21 Hen. 8. c. 19. for damages. Before that statute no damages were given, and without such a suggestion he is not within the statute, but that being only for a particular purpose, is not traversable. Salk. 94.

But if he pleads *property*, he shall have a return without making an avowry: for on demurrer, the court of B. R. resolved these points; 1st, That *property* may be pleaded either in bar or abatement; 2dly, That where a collateral matter is pleaded in abatement, the defendant shall not have a return without making an avowry: but where the plea in abatement is to the point of the action, as *property* is, the defendant shall have a return without avowry; for whether *property* be in defendant or a stranger, the defendant ought to have a return, because he had the possession which was illegally taken from him by the *replevin*, when the plaintiff had no right. *Butcher v. Porter*, Salk. 94. pl. 3.

Of the plea of
property.

Both plaintiff and defendant may plead or avow several matters, having first obtained the usual rule for that purpose.

Plaintiff in *replevin* may pay the rent into court, for which defendant avows. *Vernon v. Wynne*, 1 H. Blac. 24.

Of paying rent
into court.

Replevin for taking the plaintiff's goods and chattels, to wit, a lime-kiln; avowry for rent; plea in bar that the lime-kiln was affixed to the freehold; the court held the plea in bar bad, because it was a departure from the declaration, which had treated the lime-kiln as a chattel. *Niblet v. Smith*, 4 T. R. 504.

What shall be a
departure.

Replevin for taking cattle in a certain place called the Brills, in a certain other place there called the Boggs, the defendant avowed the taking in the place, in which, &c. because H. was seised in fee of the *locus in quo*, &c. The plaintiff demurred, because here are two places alleged, and the avowant has only answered to the *locus in quo*, &c. which is but one of

What a discon-
tinuance.

the two places. *Et per cur.* it is a discontinuance. *Week v. Speed*, Salk. 94.

Of the effects of
a discontinu-
ance.

After joinder in *demurrer*, plaintiff obtained a rule for the avowant to shew cause why he should not discontinue on payment of costs; it was objected for the avowant, that a discontinuance in replevin is very different from a *non pros*; and that after a discontinuance, a *writ de retorno habendo* could not be awarded. The court, however, did not enter into that matter, as the parties entered into a rule by consent to stay proceedings on payment of the rent arrear with costs, *Barnes*, 171.

Parties cannot
try by consent,
without pro-
ceeding regu-
larly.

The plaintiff's goods distrained were not replevied, but, by consent of the attornies on both sides, remained in the distrainor's hands; and without any writ of *resale* or appearance in the court above, the plaintiff declared, the defendants avowed, and after long special pleadings, and after trial of the issues at the assizes, and a verdict for the plaintiff, the avowants moved to set aside all the proceedings; and the rule for that purpose was made absolute. The court held the agreement to be void, a fraud upon the revenue and officers, and an abuse of the court and the bar; and that they had no jurisdiction, and consequently could not give judgment. *Barnes*, 451.

Forms of Writs, and Proceedings in Replevin.

Form of *Recordari Facias Loquelam*.

Form of *resale*.

" *George the Third*, by the grace of God, of *Great Britain, France, and Ireland*, king, defender of the faith, &c.
 " —To the sheriff of *Buckinghamshire*, greeting: We com-
 " mand you, that in your full county you cause the plaint
 " to be recorded, which is in the same county, without our
 " writ, between C. D., and E. F., and G. H., of the cattle,
 " goods, and chattels of the said C., taken and unjustly de-
 " tained, as it is said; and that you have the said record be-
 " fore us (or if in C. B. before our justices) at *Westminster*,
 " from *Easter* day, in fifteen days, under your seal and the
 " seals of four lawful knights of the same county, of such as
 " shall be present at the said record; and that you prefix
 " the same day to the parties, that then they may be there
 " ready to proceed in the said plaint as shall be just; and
 " have you there the names of the said four knights, and
 " this writ. Witness ourselves at *Westminster*, the day
 " of in the 36th year of our reign."

Let this writ be executed if the said C. desires it, otherwise not.

The

The return thereof is as follows :

" By virtue of this writ to me directed, in my full county Of return.
 " held at *Aylebury* the day of in the 36th
 " year of the reign of our sovereign lord *George* the Third,
 " king of *Great Britain, France, and Ireland, &c.* I caused
 " the plaint to be recorded, which is in the same county,
 " without the writ of our said lord the king, between C. D.,
 " and E. F., and G. H., of the cattle, goods, and chattels of
 " the said C. taken and unjustly detained, as it is said;
 " which said plaint appears in a certain schedule to this writ
 " annexed ; and I have the said record before our said lord
 " the king (or the justices of our said lord the king) at *West-*
 " *minster*, on the day within written, under my seal and the
 " seals of four lawful knights of the same county, who were
 " present at the said record ; and I have prefixed the same
 " day to the parties, that they may be then and there ready
 " to proceed in the said plaint, as shall be just.
 " The answer of A. B. Esq. sheriff."

The schedule to be annexed to the writ and return.

" At my full court held at *Aylebury* in the county of Form of sche-
 " *Bucks*, the day of in the 36th year of dule annexed to
 " the reign of our sovereign lord *George* the Third, &c. be- return.
 " fore L. M., N. O., P. Q., and R. S., four lawful knights
 " of the same county, (amongst other things,) it is thus
 " contained : C. D. complains against E. F. and G. H. of a
 " plea of taking and unjustly detaining of his cattle, goods,
 " and chattels, to wit, one mare and four colts of the said
 " C. ; and at my full court held at *Aylebury* in the county
 " aforesaid, the day of last, before S. T., J.
 " M., N. U., and W. X., four lawful knights of the said
 " county, I caused the said plaint between the parties afore-
 " said to be recorded as the writ hereunto annexed requires.
 " In testimony whereof, as well I the said sheriff, as the said
 " S. T., J. M., N. U., and W. X., who were present at the
 " said record, have caused our seals to be hereunto put, the
 " day, and year, and place above-mentioned.
 " A. B. Esq. sheriff."

Form of Writ of *Pone*.

" *George* the Third, &c.—To the sheriff of *Bucks*, greet- Form of pone.
 " ing : Put by sureties and safe pledges E. F., that he be
 " before our justices at *Westminster*, from [the return-day],
 " to answer to C. D. of a plea, wherefore he took the cattle,
 " goods, and chattels of the said C., and them unjustly de-
 " tained against gages and pledges, as he saith, and to shew
 " wherefore he hath not appeared in our court before our
 " justices at *Westminster* from [the return of the refalo] last
 " M 4 " past,

"past, as the day prefixed to him; and have you there the names of the pledges, and this writ. Witness Sir James Eyre, knight, at *Westminster*, the day of in the 36th year of our reign."

Form of *Procedendo*.

Form of *procedendo*.

"George the Third, &c.—To the sheriff of *Bucks*, greeting: Although we lately commanded you, that in your full court you caused the plaint to be recorded, which is in the same county, without our writ, between C. D. and E. F., of the cattle, goods, and chattels of the said C. taken and unjustly detained, as it was said; and that you should have the said record before our justices at *Westminster*, from [the return of the refalo], under your seal, and the seals of four lawful knights of the same county, of such as should be present at the said record, and that you prefixed the same day to the parties, that then they might be there ready to proceed in the said plaint, as should be just; and that you should have there the names of the said four knights, and that writ: Yet we, being now moved with certain causes in our court, before our said justices, command you, that in the same plaint, against the said E. F., at the suit of the said C. D., before you levied or affirmed, and now depending undetermined, you proceed at your next county-court to be holden in and for the same county, with what speed you can, in such manner, according to the law and custom of *England*, as you shall see proper; our said writ in that behalf heretofore directed to the contrary in anywise notwithstanding. Witness, &c. on, &c. at, &c. in the 36th year of our reign."

The Form of the Writ *Pro Retorno Habendo*.

Form of writ
pro retorno
habendo.

"George the Third, by the grace of God, &c.—To the sheriff of *Bucks*, greeting: Whereas E. F. was summoned to appear in our court before us (or before our justices) at *Westminster*, to answer C. D. in a plea, wherefore he took the cattle of the said C. to wit, one mare and four colts, and unjustly detained the same against sureties and pledges, as he says; and the same C. afterwards in our said court made default, whereupon it was then and there considered, that the said C. and his pledges of prosecuting should be in mercy, and that the aforesaid E. should go thereupon without delay, and that he should have a return of the cattle aforesaid. Therefore we command you, that you cause to be returned the cattle aforesaid to the said E. without delay; and the same at the complaint of the aforesaid

"aforesaid C. you do not deliver without our writ, which shall make exprefs mention of the aforesaid judgment; and in what manner you shall execute this our precept, you shall make manifest to us (or to our justices) at *Westminster*, on [a general return-day, all the proceedings being by original]; and have you there this writ. Witness, &c. on, &c. in the 36th year of our reign."

The Writ of second Deliverance is to the following Effect:

"George the Third, &c.—To the sheriff of *Bucks*, greeting: We command you, if C. D. shall make you secure of prosecuting his complaint, and also of returning the cattle which to E. F. lately in our court, before our justices at *Westminster*, at a certain day now past, were adjudged by the default of him the said C. D. if a return thereof shall be adjudged, then the cattle to him the said C. D. without delay, you cause to be delivered, and put by sureties and safe pledges the aforesaid E. F. that he be before our justices at *Westminster* [the return], to answer the said C. D. of the taking of the cattle aforesaid, and that you have there the names of the pledges, &c. and this writ. Witness Sir *James Eyre*, knight, at *Westminster*, the day of in the 36th year of our reign."

Writ of second deliverance.

Form of Writ of *Withernam*.

"George the Third, &c.—To the sheriff of *Bucks*, greeting: Whereas E. F. was summoned to appear in our court, before our justices at *Westminster*, to answer C. D. of a plea, wherefore he took the cattle of the said C. and unjustly detained the same against sureties and pledges, as he says; and the same C. afterwards, in our same court, made default in the same plea; whereupon it was then and there considered, that the same C. and his pledges of prosecution should be in mercy; and that the said E. should go thereupon without delay, and that he should have a return of the cattle aforesaid: whereupon, by our writ, we commanded you, that you caused to be returned the cattle aforesaid to the said E. without day, and the same at the complaint of the said C. you should not deliver without our writ, which of the aforesaid judgment should make exprefs mention, and in what manner you should have executed our said precept you should make manifest to our justices at *Westminster*, on [the return-day of the retorno habendo] last past; on which day you returned to our said justices at *Westminster*, that before the coming of the aforesaid writ, the cattle aforesaid were cloigned or conveyed away to places unknown to you by

Writ of withernam.

"the

“ the said C. so that the cattle aforesaid to the said E. you
 “ could not cause to be returned, as by the said writ you
 “ was commanded: Therefore we command you, that of
 “ the cattle before taken in *withernam*, you take and deliver
 “ to him the said E. to be held by him, until the said cattle,
 “ before taken, you can cause to be returned; and put by
 “ sure and safe pledges the aforesaid C. that he be before
 “ our justices at *Westminster*, on [*the return-day*], to answer
 “ as well to us of the contempt, as to the said E. of the
 “ damages and injuries to him in that behalf done; and in
 “ what manner this our precept you shall execute make
 “ appear to our justices at *Westminster*, at the aforesaid re-
 “ turn; and that you have there the names of the pledges,
 “ with this writ. Witness, &c. on, &c. at, &c. in the
 “ thirty-sixth year of our reign.”

SECTION III.

*Of the Proceedings in Replevin when the Distress is
 for Rent.*

(A) How to make such Distress, and of selling the same.

(B) How and when Replevin to be made, and of the Replevin Bond.

(C) Of Removing the Suit into the Court above and the Proceedings there,

(A) (A) How to make such Distress, and of selling the same.

The landlord himself, or any other person, as his bailiff, by an authority from him in writing, may make the distress. The warrant or authority may be in the following form.
 “ To Mr. A. B., my bailiff, greeting.—Distrain the goods
 “ and chattels of C. D. (the tenant), in the house he now
 “ dwells in (or on the premises in his possession), situate in
 “ in the county of for pounds,
 “ being one year’s rent, due to me for the same at Christmas-
 “ day last, and for your so doing, this shall be your sufficient
 “ warrant and authority. Dated the day of
 “ 1795.

Written au-
 thority to dis-
 train.

“ J. S.”
 Being

Being legally authorized to distrain, you enter on the premises, and make a seizure of the distress. If it be made in a house, seize a chair or other piece of furniture, and say,
 "I seize this chair, in the name of all the goods in this house, for the sum of pounds, being one year's rent, due to me (or to J. S. the landlord) at Christmas-day last, by virtue of an authority from the said J. S. for that purpose (provided you distrain as bailiff)."

How to make distress.

Then take an inventory of so many goods as you judge will be sufficient to cover the rent distrained for, and also the charges of the distress. Make a copy thereof, as follows:

"An inventory of the several goods and chattels distrained by me A. B. this day of in the year of our Lord in the houses, out-houses, and lands (as the case is) of C. D. situate in in the county of by the authority and on the behalf of J. S. (provided you distrain as bailiff) for the sum of pounds, being one year's rent due to me, or to the said J. S. (as the case is) at Christmas-day last.
 "In the dwelling-house, two tables, two chairs, &c.
 "In the barn, six hurdles, and so on."

The inventory.

At the bottom of the inventory, subscribe the following notice to the tenant:—

"Mr. C. D.

"Take notice, that I have this day distrained (or that as bailiff to J. S. your landlord, I have this day distrained) on the premises above mentioned, the several goods and chattels specified in the above inventory, for the sum of pounds, being one year's rent due to me (or to the said J. S.) at Christmas-day last, for the said premises; and that unless you pay the said rent, with the charges of distraining for the same, within five days from the date hereof, the said goods and chattels will be appraised and sold according to law. Given under my hand, the day of in the year of our Lord

The notice to the tenant.

"W. T."

A true copy of the above inventory and notice must either be given to the tenant himself, or left at his house, or if there be no house, on the most notorious place on the premises. And it is proper to have a person with you when you make the distress, and also when you serve the inventory and notice, to examine the same, and to attest the regularity of the proceedings.

How served.

The goods may be removed immediately, and in the notice the tenant may be acquainted where they are removed; but it is now most usual to put a man into possession, and let them

Of removing the goods.

When they may
be sold.

them remain on the premises till you are entitled by law to sell them (a), which is on the sixth day inclusive, after the distress made, i. e. goods distrained on the Saturday, may be removed and sold on the Thursday afternoon following. *Wallace v. King and another*, 1 H. Blac. 13.

How, if further
time required.

If the tenant require further time for the payment of the rent, and the landlord chooses to allow it, it is best to take a memorandum in writing from the tenant; "That he does consent that he should continue in possession of his goods and chattels in his house (or upon the premises) for such a time longer, you having agreed not to sell them for that time, and that he will pay the expences of keeping possession." This memorandum prevents the landlord from being deemed a trespasser, which, after the expiration of five days, he otherwise would be, and might have an action of trespass brought against him for staying longer upon the premises.

Agreement for
that purpose.

How to search
for replevin and
proceed to sale.

If there is no allowance of, or agreement for, further time, search at the expiration of the five days at the sheriff's office to see if the goods have been replevied; if not, and the rent and charges still remain unpaid, send for a constable (b) and two sworn appraisers, who having viewed the goods, the former must administer to the latter the following oath:

Appraisers oath.

"You, and each of you, shall well and truly appraise the goods and chattels mentioned in this inventory (holding it in his hand), according to the best of your judgment. So help you God."

Memorandum
thereof.

Then indorse on the inventory the following

"Memorandum; that on the day of in the
"year of our Lord A. B. of, &c. and C. D. of,
"&c. two sworn appraisers, were sworn upon the Holy
"Evangelists, by me J. K. of, &c. constable, well and truly
"to appraise the goods and chattels mentioned in this in-
"ventory, according to the best of their judgment,

"As witness my hand,

"Present at the time J. K. constable."
"of swearing the said
"A. B. and C. D. as
"above, and witness
"thereto,

"L. M.

"O. P."

(a) By the common law a distress was merely a pledge, and could not be sold but to protect landlords in the recovery of their rent, the statute 2 W. & M. 1 C. 5. 1. 2. authorizes the sale of goods distrained for rent, after five days from the making of the distress.

(b) It should be a constable of the hundred, parish, or place where such distress was taken, and not one out of the district. *Wallace v. King*, 1 H. Blac. 14.

After

After the appraisers have valued the goods, continue the indorsement on the inventory as follows :

" We, the above named A. B. and C. D. being sworn
 " upon the Holy Evangelists, by J. K. the constable above
 " named, well and truly to appraise the goods and chattels
 " mentioned in this inventory, according to the best of our
 " judgment; and, having viewed the said goods and chattels,
 " do appraise and value the same at the sum of
 " pounds. As witness our hands the day of
 " in the year of our Lord

Appraisement.

" A. B. }
 " C. D. } Sworn Appraisers."

When the goods are thus valued, it is usual for the appraisers to buy them at their own valuation, and a receipt at the bottom of the inventory, witnessed by the constable, is usually held a discharge. But if the distress be of considerable value, it is much more advisable to have a proper bargain and sale between the landlord, the constable, the appraiser, and the purchaser.

How disposed of.

The goods being disposed of, deduct the rent in arrear, and all reasonable charges attending the distress, and return the overplus (if any) to the tenant.

If the produce is not sufficient to cover the demand, you may distrain again.

Formerly the least irregularity in the above proceedings in making a distress, would make the parties trespassers *ab initio*; but now by the statute 11 Geo. 2. c. 19. it is otherwise, and the party aggrieved shall only have his action of trespass or on the case, for the special damage sustained by reason of such irregularity.

How if any irregularity in proceedings.

Trover, therefore, will not lie for taking goods under a distress, though there might have been some irregularity. *Wallace v. King*, 1 H. Blac. 13.

What actions will lie.

(B) How to make Replevin, and of the Replevin Bond.

(B)

If the tenant means to replevy, he must, within five days after notice of the distress, take with him two housekeepers living in the city or county where the distress was made, and go to the sheriff's-office of such city or county, where he must enter into a bond with the two housekeepers, as sureties in double the value of the goods distrained, according to the statute 11 Geo. 2. hereafter mentioned; upon this the sheriff will direct a precept to one of his bailiffs, and the possession

How to be replevied.

What pledges
taken.

possession of the goods will be restored to the tenant to abide the event of the suit in replevin. See *ante*, Sec. ii. (A).

It has been observed, Sec. ii. (A), that upon making replevin, two kinds of sureties were at common law taken by the sheriff, viz. for prosecuting the suit, and for returning the goods if a return were awarded. The first were merely nominal (*John Doe* and *Richard Roe*), but the second should be real responsible persons.

Of the stat.
11 Geo. 2. and
of the replevin
bond.

Sheriffs, however, gradually became remiss in their duty, and often neglected taking these pledges *pro retorno habendo*; or if any were taken, for the most part they were found to be indigent and irresponsible people; the stat. of 11 Geo. 2. c. 19. s. 23. for the better securing the payment of rents, and preventing frauds by tenants, enacts, "That to prevent vexatious replevins of distresses taken for rent, all sheriffs and other officers having authority to grant replevins, may and shall, in every replevin of a distress for rent, take, in their own names, from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained, (such value to be ascertained by the oath of one or more credible witness or witnesses not interested in the goods or distress, which oath the person granting such replevin is hereby authorized and required to administer,) and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded before any deliverance be made of the distresses."

Of the assign-
ment of bond.

And for the further protection of landlords, and by way of putting the remedy into their own hands, it is also ordered by the same statute, "That such sheriff, or other officer as aforesaid, taking any such bond, shall, at the request and costs of the avowant, or person making consufance, assign such bond to the avowment or person aforesaid, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses; which may be done without any stamp, provided the assignment, so indorsed, be duly stamped before any action be brought thereon; and if the bond so taken and assigned be forfeited the avowant, or the person making consufance, may bring an action, and recover thereupon in his own name; and the court, where such an action shall be brought, may, by a rule of the same court, give such relief to the parties, upon such bond, as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeazance to such bond."

(C) Of

(C) Of removing the Suit and Proceeding in Court above.

This is done in the same way as where the distress was not for rent. See *ante*, Sec. ii. (C), (D), (E), (F). So are the proceedings except in cases of nonsuit, or till the verdict, which see, *post*. Sec. v.

SECTION IV.

Of the Remedy in case of insufficient Pledges, whether Distress be for Rent or not.

(A) By Action against the Sheriff.

(B) By Scire Facias against the Pledges.

(C) By Proceeding on the Replevin Bond.

(A) Of the Remedy by Action against the Sheriff. (A)

The sheriff upon making replevin is compelled to take pledges, and they must be sufficient pledges, or an action on the case will lie against him; but the court will not proceed in a summary way, by granting an attachment against the sheriff for rejecting to take a replevin bond. *R. v. Lewis*, 2 D. & E. 617.

Sheriff must take bond.

But in case pledges are taken, and they prove insufficient, the party has a double remedy, viz. against the sheriff, and against the bail: against the sheriff by action, and against the bail, if the distress was *not* for rent, by *scire facias*; if *for rent*, either by *scire facias*, or upon the replevin bond, assigned according to the statute.

The remedy, if pledges be insufficient.

The pledges taken by the sheriff when the distress is not for rent, are according to the statute of Westm. 2., and may be by bond, and that too of the plaintiff himself only; for one is enough if responsible, though the statute uses the word pledges. Gilb. Dict. 68.

What pledges, if distress not for rent.

But the sheriff cannot take money or cattle as a pawn or pledge. Cro. Car. 322. *Mosser v. Gray*.

The pledges taken when the distress is for rent, are governed by stat. 11 Geo. 2. c. 16., and must be by bond with two sureties, and ought to be at least in double the value of the goods distrained.

What, if for rent.

The sheriff, the under-sheriff, and the replevin clerk, are all answerable to the defendant in replevin for the sufficiency

Who are answerable for insufficient pledges.

of

of the pledges *de retorno habendo*. 2 Blac. 1220. *Richards v. Acton*.

What is the remedy.

The general remedy is by action against the sheriff only, in which action some evidence must be given by the plaintiff of the insufficiency of the pledges; but very slight evidence is sufficient to throw the proof on the sheriff, for the sureties are known to him, and he is to take care that they are sufficient. *Saunders v. Darling*, Trin. 10 Geo. 3. 2 Crom. 229.

Of the action against the sheriff.

This action against the sheriff will lie without any *scire facias*, previously sued out against the bail. *Pattison v. Prime*, Hil. 13 Geo. 2.

Whether party can be relieved on motion.

But in the case of *Richards v. Acton*, 2 Blac. 1220, after judgment *pro retorno*, and an *eloignment* returned, the court on motion made a rule against the sheriff, under-sheriff, and replevin, to pay the defendant 57*l.* 15*s.* the amount of the verdict in replevin, (damages and costs,) together with the costs of the application.

Of the quantum of damages.

Much doubt has been entertained as to the *quantum* of damages which the plaintiff ought to recover in an action upon the case against the sheriff, for taking insufficient pledges; and by the latest determinations the two courts still differ upon it.

How in K. B.

In the King's Bench it is held, that the plaintiff cannot recover beyond the value of the distress. The argument is, that the duty of the sheriff, as prescribed by the act, is to take a bond for prosecuting the suit, and for a return of the goods, if a return shall be awarded. The bond therefore would be satisfied by returning the goods taken. If so, the value of those goods seems to be the true measure of damages to be given in the action. That by the stat. West. 2. it is specifically mentioned, that if any take pledges otherwise, he shall answer for the price of the beasts. And that the 11 Geo. 2. does not enlarge the sheriff's responsibility in this respect.

Reason of their decision.

How in C. B.

But in the Common Pleas, the direct contrary is holden, and there the plaintiff may recover the amount of his rent, his costs in the replevin suit, the value of the goods, and whatever other damages the jury may give him, even beyond the penalty of the replevin bond, *i. e.* more than double the value of the goods distrained.

Reason of their determination.

As the court, in giving judgment in this case, were aware of the contrary determination in the King's Bench, they thought proper to give their reasons for differing in opinion, and to enter fully into the law of the subject; which as it may be explanatory of this doctrine of pledges, and of the alteration made in the common law by the statutes, West. 2. and 11 Geo. 2., it may not be improper to give in this place.

At

At common law the sheriff, on delivering the goods, took pledges to prosecute, who were to answer the amercement. By the stat. West. 2. "He who delivered the goods, was also to take pledges for the return of the beasts or the price of them;" and it appears from 2 Inst. 340. "That if he took insufficient pledges, they were no pledges within that statute, and the sheriff was charged by it as if he had taken no pledges at all." At that time then the sheriff was liable to answer the value of the goods. From thence down to the 21 Hen. 8. there could be no question as to costs, as there were no costs given to the avowant, before the passing of the stat. 21 H. 8. c. 19. But it appears from 2 Inst. 107 and 341, that after judgment of return irrepleviable, the lord or avowant was not bound to return the cattle, unless not only the arrearages of rent were tendered, but also "all that was done upon the judgment in avowry."

Thus the law stood till the act 11 Geo. 2. c. 19. was made; the last section of which was to remedy the mischiefs of vexatious proceedings in replevin. In this section also, the case is supposed that the bond which is the additional security might be forfeited. If so, the penalty is a debt, and judgment must be entered up to the extent of it; but in the same section there is an equitable jurisdiction given to the court, to qualify the penalty by giving such relief to the parties upon the bond, as may be agreeable to justice and reason, by rule of court, which shall have the nature and effect of a defeasance to the bond. This made a material alteration in the law with respect to the relief which the landlord has, where the replevin is vexatious: as the judgment is for the whole penalty, it must cover, according to the equitable jurisdiction of the court, all that has been lost by the proceeding: there would be no equity, it would not be "agreeable to justice and reason," unless the whole were covered. If therefore an action were brought on the security given by the statute, the party would be entitled to the whole. The only question then is, how far he shall be entitled where he does not proceed upon the statute. In *Prosser v. Pattison*, (Bul. Ni. Pri. 60.) it was decided after great doubt that an action on the case would lie. What then is the measure of damages in an action on the case against an officer, for neglecting the duties of his office? What has the plaintiff lost by the neglect? This is a culpable neglect, not merely a simple non-feasance, and must have been accompanied with a bad intention. The rule then must depend upon what damages the party has sustained. The great doubt we have had, has been, whether we could go beyond the penalty of the bond. But

History and origin of the pledges, and of the alterations made by the stat. West. 2. and 11 Geo. 2.

To what extent the party is to recover.

this is the same sort of question, as whether an action on the case would lie; and there is no rule which says, that in an action on the case for an injury accompanied with a bad intent, less shall be recovered than the whole damages sustained. The verdict therefore must be entered for the whole sum found by the jury. *Concannon v. Lethbridge*, 2 H. Blac. 40.

(B) (B) Of the Remedy by *Sci. fa.* against the Pledges.

Of the remedy
by *sci. fa.*

Another remedy which the defendant in replevin has, if the plaintiff does not make a return of the goods, when a return has been awarded, is, by *scire facias* against the pledges. Before a *scire facias* issues, a writ *pro retorno habendo* must have been sued out, and an *elongata* or *eloignment* be returned by the sheriff. After which, if the names of the pledges be not known, an application may be made to the replevin clerk, and if he refuses or delays to tell them, the court on motion will make a rule upon him for that purpose. 2 Blac. 1220.

If the plaint has never been removed, defendant may sign a *non pros* in the court below, and have a precept in the nature of a *sci. fa.* 2 Will. 41.

N. B. The two remedies above-mentioned are used where the distress is not for rent, as well as when it is.

(C) (C) Of the Remedy on the Replevin Bond.

Of the remedy
on replevin
bond.

The usual remedy where the distress is for rent, and a replevin bond is entered into, according to 11 Geo. 2. is by taking an assignment of the replevin bond, and bringing an action thereon against the pledges in defendant's own name.

By the statute, the sheriff is ordered, at the request and costs of the avowant, or person making consufance, to make such assignment. See *ante* (B).

Who is entitled
to the assign-
ment.

By the above words it might seem as if the defendant must first avow or make consufance, to entitle himself to an assignment of the bond: but there is no occasion for either; and even if the plaintiff in replevin does not appear at the county-court, according to the condition of the replevin bond; and although no steps are taken in the court below, nor the proceedings removed into the superior court, yet the defendant may demand such assignment, and may sue in the court above as assignee of the sheriff, averring in his declaration, that plaintiff did not appear at the next county-court,

and prosecute according to the condition of the bond. *Dias v. Freeman*, 5 D. & E. 195.

The bond may be assigned four days exclusive after the time limited therein for plaintiff to prosecute his suit.

When assignment to be made, and of the proceedings thereon.

The mode of assigning and proceeding on replevin bond is the same as on bail bond, which see Vol. I. Ch. iv. Sec. vii.

The action must be brought in the same court in which the *resale* is returnable.

To what amount plaintiff in the action is entitled to recover in the courts of K. B. and C. B., see above in this Section (A).

To what amount damages may be.

SECTION V.

Of the Non Pros, Nonsuit, Verdict, and Judgment.

(A) When the Distress is for Rent, under the Statute 17 Car. 2.

(B) When the Distress is not for Rent, or not under the Statute.

(A) When the Distress is for Rent, under the Statute 17 Car. 2.

(A)

If the cause has been removed into the superior court by the *plaintiff*, and after the defendant has appeared he does not declare or proceed therein; or if the cause has been removed by the *defendant*, and a rule being served on the plaintiff, he does not declare or proceed therein; the defendant may sign a *non pros*, enter up judgment *pro retorno habendo*; and if the *original distress* was made *for rent*, he may proceed to execute a writ of inquiry of damages, which is the better way than taking out a writ *pro retorno habendo*; because that writ may be superseded by the plaintiff's suing out a *writ of second deliverance*, as was seen before. For by the statute 17 Car. 2. c. 7. an act for the more speedy and effectual proceeding upon distresses and avowries for RENTS, reciting, that "Forasmuch as the ordinary remedy for arrearages of rents, is by distresses upon the lands chargeable therewith; and yet nevertheless, by reason of the intricate and dilatory proceedings upon replevin, that remedy is become ineffectual:" It is enacted, "That whensoever any plaintiff in replevin shall be nonsuit before issue joined, in any suit of replevin by plaint or writ lawfully returned, removed, or depending in any of the king's courts at Westminster,

Stat. 17 Car. 2.

If plaintiff be nonsuit before issue joined.

Suggestion to be made.

A writ of inquiry to issue,

and execution by si. fa. or elegit.

If nonsuit after issue joined, or in case of verdict, jury to assess, &c.

How on demurrer.

Party may distrain again, if first distress not sufficient.

“ that the defendant making a *suggestion*, in nature of an avowry of consuance for such rent, to ascertain the court of the cause of distress, the court upon his prayer shall award a writ to the sheriff of the county where the distress was taken, or inquire by the oaths of twelve good and lawful men of his bailiwick, touching the sum in arrears at the time of such distress taken, *and* the value of the goods or cattle distrained: and thereupon notice of fifteen days shall be given to the plaintiff, or his attorney, in court, of the sitting of such inquiry: and thereupon the sheriff shall inquire of the truth of the matters contained in such writ, by the oaths of twelve good and lawful men of his county: and upon the oath of such inquisition, the defendant shall have judgment to recover against the plaintiff the arrearages of such rent, in case the goods or cattle distrained shall amount unto that value: and in case they shall not amount to that value, then so much as the value of the said goods and cattle so distrained shall amount unto, together with his full costs of suit: and shall have execution thereupon by *feri facias* or *elegit*, or otherwise, as the law shall require. *And* in case such plaintiff shall be nonsuit after consuance or avowry made, and issue joined, or if the verdict shall be given against such plaintiff, *then the jurors that are impannelled, or returned to inquire of such issue*, shall, at the prayer of the defendant, inquire concerning the sum of the arrears, *and* the value of the goods or cattle distrained: and thereupon the avowant, or he that makes consuance, shall have judgment for such arrearages, or so much thereof as the goods or cattle distrained amount unto, together with his full costs, and shall have execution for the same by *feri facias* or *elegit*, or otherwise as the law shall require.”

Sec. 3. gives the like remedy to the *avowant*, &c. upon a judgment given for him upon *demurrer*.

And *sec.* 4. enacts, “ That in all cases aforesaid, where the value of the cattle distrained as aforesaid shall not be found to be the full value of the arrears distrained for, that the party to whom such arrears were due, his executors or administrators, may, from time to time, distrain again for the residue of the said arrears.”

By the above statute, in case of a nonsuit or *non pros* before issue joined, defendant may enter a suggestion upon the record, in the nature of an avowry or consuance, and thereupon sue out a writ of inquiry; but in case of a nonsuit at the trial, or of a verdict for defendant, the jury at the trial must inquire of the rent in arrears, and the value of the goods distrained.

If they omit to make such inquiry, no other jury can afterwards make it; no writ of inquiry therefore can go, the defendant cannot enter his judgment according to the statute, and proceed to execution by *fi. fa.* or *ca. sa.*, but must resort to his common law judgment, and sue out his writ *pro retorno habendo*. *Tucket v. Stephens*, Carth. 362. 1 Lev. 255. See also *ante*, Ch. XIV. Sec. i. (B. 1).

Jury at the trial must inquire, &c.

And this, if the jury omit to inquire either of the rent or the value of the goods, for they must assess both; the statute must be strictly complied with.

How if they omit so to do

But this is only in cases of rent within the statute; for other cases of nonsuit, see *post* (F).

If the plaintiff become nonsuit, the defendant is not bound to take his remedy under the statute, but has his option either to proceed by writ of inquiry under it, or bring his action against the plaintiff and his sureties on the replevin bond. *Waterman v. Kea*, 2 Wils. 41.

Party not bound by the statute;

Nor does the statute take away or alter the judgment at common law, it only gives a further remedy to the avowant.

nor is the judgment altered thereby. How judgment may still be.

So that after a *non pros*, plaintiff may still enter his judgment *pro retorno*; but it is better to make a suggestion, and proceed by writ of inquiry; because, if plaintiff sue out a writ of second deliverance, it will operate as a *superseas* to the *retorno habendo*, but not to the writ of inquiry. *Cooper v. Sherbrook*, Bar. 426. 2 Wils. 116.

For by this statute the legislature intended that the proceeding by writ of inquiry, *fi. fa.* and *elegit* should be final for the avowant to recover his damages, and that the plaintiff should keep his cattle notwithstanding the course of awarding a *retorno habendo*, which is the right judgment, and it is still entered up as before the statute. 2 Wils. 117. Carth. 253.

If the plaintiff is nonsuited for want of delivering a declaration, if it was through any cause that would have entitled him to a writ of *second deliverance*, as sickness of the person employed, &c. the court will order the defendant to accept of a declaration on payment of costs: otherwise, the plaintiff would be remediless, the writ of *second deliverance* being taken away by the 17 Car. 2. in cases of *rent*. Vent. 64.

In what cases plaintiff will be let in after nonsuit.

Where the judgment is for defendant after verdict, if the jury have not inquired at the trial as the statute directs, it must be entered up, as has been before observed, as a common law judgment, *pro retorno habendo*.

If verdict for defendant, how the judgment to be.

But if the jury have assessed damages, but not the amount of the rent, &c. it may be entered as a judgment under the 21 H. 8. c. 19. *Gamon v. Jones*, 4 D. & E. 509.

How it may be amended.

And the court will permit defendant to amend his judgment, if entered as under the statute, and not warranted thereby, to make it a common law judgment.

Even after writ of error.

Where the defendant in replevin made conuſance for rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in his conuſance, without finding either the amount of the rent in arrear, or the value of the cattle diſtrained, and judgment was entered for the damages aſſeſſed, the court permitted the defendant to amend his judgment, and to enter a judgment *pro retorno habendo*, after a writ of error brought, *Rees v. Morgan*, 3 T. R. 349.

Form of Entry of a Suggestion in the Nature of a Cognizance.

Form of suggestion in nature of cognizance.

“ *Bucks*, to wit.—E. F. was ſummoned to answer C. D. in a plea, wherefore he took the cattle, goods, and chattels of the ſaid C., and unjuſtly detained the ſame againſt gages and pledges, &c.; and whereupon the ſaid E. offered himſelf in court here, in his own proper perſon, on the day of againſt the ſaid C. in the plea aforeſaid, and the ſaid C. came not, but made default: Therefore it is conſidered, that the ſaid C. and his pledges for proſecuting be in mercy, and that the ſaid E. go thereof without day, and have a return of the ſaid cattle, goods, and chattels, &c.; and thereupon the ſaid E. ſays, that he the ſaid E. took the ſaid cattle, goods, and chattels of the ſaid C., for the taking whereof he was ſummoned to appear in the ſaid court of our ſaid lord the king of the bench at *Weſtminſter*, to answer to the ſaid C. as aforeſaid, at the pariſh of O. in the ſaid county, in a certain place there called the ſtable; and that he took the ſame as bailiff of J. A., for that the ſaid C. at the time of the taking the ſaid cattle, goods, and chattels, and for the ſpace of two years and three quarters of a year, ended at and upon the day of and from thence until the time of the taking of the ſaid cattle, goods, and chattels, held and enjoyed the ſaid ſtable, with the appurtenances, amongſt other things, as tenant thereof to the ſaid J. A. at and under the yearly rent of twelve pounds, payable quarterly; and becauſe the ſum of thirty-three pounds, of the yearly rent aforeſaid, for two years and three quarters of another year, ending at and upon the ſaid day of in the ſaid year of our Lord 1796, on that day in that year, and at the time of taking the ſaid cattle, goods, and chattels, were in arrear and unpaid, he

“ the

“ the said E., as bailiff of the said I., took the said cattle,
 “ goods, and chattels, for and in the name of a distress for
 “ the said rent so due in arrear, and owing from the said C.
 “ to the said J. as aforesaid: and the said E., according to
 “ the form of the statute in such case made and provided,
 “ prays a writ of our lord the king to be directed to the
 “ sheriff of *Bucks*, to inquire of the sum in arrear of the
 “ rent aforesaid, and of the value of the cattle, goods, and
 “ chattels aforesaid; and it is granted to him. Wherefore
 “ the sheriff is commanded, that, by the oath of twelve good
 “ and lawful men of his bailiwick, he diligently inquire how
 “ much rent was in arrear and due to the said J. at time of
 “ the taking of the cattle, goods, and chattels aforesaid, and
 “ how much the said cattle, goods, and chattels so taken in
 “ the name of a distress as aforesaid were worth, according
 “ to the true value thereof; and the inquisition which he
 “ shall thereupon take, let him make appear here on [the
 “ return day], under his seal and the seals of those by whose
 “ oath he shall take the said inquisition,” &c.

Upon entering the above suggestion on a roll, the defendant may then sue out his writ of inquiry, which is to the following effect:

“ *George the Third*, by the grace of God, &c.—To the Writ of inquiry.
 “ sheriff of *Bucks*, greeting: Whereas E. F. was lately sum-
 “ moned to appear in our court of the bench, before our
 “ justices at *Westminster*, to answer unto C. D. of a plea,
 “ wherefore he took the cattle, goods, and chattels of the
 “ said C., and unjustly detained the same against gages and
 “ pledges, until, &c. and the said E. F. offered himself in
 “ court, before our justices at *Westminster*, in his own pro-
 “ per person, on the day of against the
 “ said C. in the plea aforesaid: and the said C. came not,
 “ but made default: Therefore it was considered that the
 “ said E. and his pledges should be in mercy; and that the
 “ said E. should go thereof without day, and have a return
 “ of the said cattle, goods, and chattels. And thereupon it
 “ hath been suggested to us in our said court, before our said
 “ justices at *Westminster* aforesaid, by the said E., that he the
 “ said E. took the said cattle, goods, and chattels of the said
 “ C., for the taking whereof he was summoned to appear in
 “ our said court of the bench, before our said justices at
 “ *Westminster* aforesaid, to answer the said C. D. as afore-
 “ said, at the parish of O. in the said county, in a certain
 “ place there called the stable, and that he took the same
 “ as bailiff of J. A.; for that the said C. for the space of
 “ two years and three quarters of another year, ending at
 “ and upon the said day of in the year of our
 “ N 4 “ Lord

" Lord 1796, and from thence until and at the time of
 " taking of the said cattle, goods, and chattels, held and
 " enjoyed the said stable, with the appurtenances, amongst
 " other things, as tenant thereof to the said J., at and under
 " the yearly rent of twelve pounds, payable quarterly: and
 " because the sum of thirty-three pounds of the yearly rent
 " aforesaid, for two years and three quarters of another year,
 " ending at and upon the said day of in the
 " year of our Lord 1796, on that day in that year, and at
 " the time of taking the said cattle, goods, and chattels,
 " were in arrear, and unpaid to the said J., he the said E.,
 " as bailiff of the said J., took the said cattle, goods, and
 " chattels, for and in the name of a distress for the said rent
 " so due in arrear, and owing from the said C. to the said J.
 " as aforesaid: and the said E., according to the form of
 " the statute in such case made and provided, prayed our
 " writ to be directed to you, to inquire of the sum in arrear
 " of the rent aforesaid, and of the value of the cattle, goods,
 " and chattels aforesaid. Therefore we command you, that
 " according to the form of the statute in that case made and
 " provided, you diligently inquire, by the oath of twelve
 " good and lawful men of your county, how much of the
 " yearly rent aforesaid, at the time of taking the said cattle,
 " goods, and chattels, were in arrear and unpaid; and how
 " much the said cattle, goods, and chattels taken as afore-
 " said were worth, according to the true value of the same;
 " and the inquisition which you shall thereupon make, you
 " shall certify to our justices at *Westminster* on [the return]
 " under your seal, and the seals of those by whose oath
 " you shall take that inquisition; and have you there the
 " names of those by whose oath you shall take that inquisi-
 " tion, and this writ. Witness Sir *James Eyre*, knight, at
 " *Westminster*, the day of in the thirty-sixth
 " year of our reign."

(B)

(B) Of the Verdict and Judgment in Cases not within 17 Car. 2.

We have hitherto only treated of the judgment and execution in cases of rent, under the statute of 17 Car. 2. it remains to shew what the judgment is when the distress is not for rent, or defendant does not proceed under that statute. At common law, (even before the statute of Gloucester,) the plaintiff in replevin could recover damages, and by that statute his costs. But the ayowant or defendant in replevin was entitled to neither till the 7 Hen. 8. c. 4. which

Of plaintiff's
 damages and
 costs.
 Of defendant's.

which gives damages and costs to every avowant, and to every person making consuſance, or juſtifying as bailiff in replevin, for any rent, cuſtom, or ſervice, if his avowry, conſuſance, or juſtification be found for him, or the plaintiff be otherwiſe barred. And by the ſtat. 21 Hen. 8. c. 19. it is enacted, "That every avowant, and every other perſon or perſons that make an avowry, juſtification, or conſuſance, as bailiff or ſervant to any perſon or perſons in any *replegiare* or ſecond deliverance, for rents, cuſtoms, ſervices, or for damages *ſeſant*, or rent or rents upon any diſtreſs taken in any lands or tenements, if the ſame avowry or conſuſance, or juſtification, be found for them, or the plaintiffs in the ſame nonſuit, or otherwiſe barred, that then they ſhall recover their damages and coſts againſt the ſaid plaintiffs, as the ſame plaintiffs ſhould have done or had, if they had recovered in the *replegiare*, or ſecond deliverance found againſt the defendants."

Neither this ſtatute, nor the 43. Eliz. [if the defendant avows as overſeer for a diſtreſs for a poor rate], tie the inquiry up to the *ſame jury* as are returned or impannelled, as the 17 Car. 2 c. 7. does. Salk. 95.

Same jury need not aſſeſs them.

If therefore there is a verdict for the plaintiff, the jury uſually aſſeſs the damages. 2 Saund. 315.

How if the verdict be for plaintiff.

Or the jury after verdict may be diſmiſſed, and damages aſſeſſed by the juſtices, with the defendant's conſent.

Or if the jury do not aſſeſs the damages, and the goods, &c. ſhould be detained, the plaintiff may make a ſuggeſtion thereof upon the roll, whereupon a writ ſhall go to inquire of the value of the cattle, &c. and damages; upon which the plaintiff ſhall have judgment for both. *Dewell v. Marſhall*, 3 Wiſt. 442.

If there is a judgment for the plaintiff upon a *reſcripta verificatione*, *cognovit actionem*, *nil dicit*, &c. or for want of a replication to his plea in bar to the avowry, or upon a demurrer, a writ of inquiry of damages ſhall be awarded. Com. Dig. 5 vol. 303.

How if judgment for plaintiff, by confeſſion or default of defendant.

Or at the requeſt of the plaintiff, by the aſſent of the defendant, the juſtices may aſſeſs the damages without a writ of inquiry.

But if there is judgment for the plaintiff in replevin, *quod adhuc detinet* by default after appearance, there ſhall be a ſpecial writ of inquiry for the value of the goods or cattle and damages. F. N. B. 69. l. Co. Ent. 611. a.

But where the taking was lawful, the damage ſhall be only for the detainer, as where goods are taken *damage ſeſant*, and detained after amends tendered. F. N. B. 69. t. g.

If

Of judgment
for defendant
by default, &c.

If plaintiff lets judgment go by default, or becomes nonsuit, defendant is entitled to his judgment *pro retorno*, and to a writ of inquiry to assess his damages and costs; or if the defendant get a verdict, the jury may assess the damages, or if they omit so to do, a writ of inquiry may go.

Of judgment
for defendant
after verdict.

The judgment after verdict for defendant need not express the return to be irrepleviable, because now it necessarily must be so, since the statute West. 2. see *ante* (D).

Therefore a judgment in replevin, "that the defendants have a return of the cattle, and recover their damages and costs assessed by the jury," &c. is good either as a judgment at common law, though the return be not adjudged irrepleviable, or as a judgment under 21 H. 8. c. 19. which entitles the defendants to damages and costs, but not under the statute 17 Car. 2. *Gamon v. Jones*, 4 D. & E. 510.

Of the *capias*
in *withernam*.

If the defendant, upon the judgment *de retorno habendo*, sue out a writ *pro retorno habendo*, and the sheriff cannot find the cattle, he may have a *capias in withernam*, upon the return of *elengata*. 2 Leon. 174.

Of the tender
after judgment.

But if the defendant has a judgment for a *return irrepleviable*, if the owner of the cattle or goods tenders all that is due on the judgment, and it is accepted, he shall have a *writ of delivery* for the goods. 2 Inst. 107.

So if he tenders the whole upon the judgment, which is ascertained upon the avowry, and is refused, he shall have *detinue*. 2 Inst. 107.

In avowry for *damage feasant*, defendant had a verdict, and adjudged that he shall have a *return. habend.* for the cattle, and a *ca. sa.* for the damages; but if the party tender the costs and damages, the sheriff, after such tender, ought not to execute the *return. habend.*

Of the writ of
restitution.

But if for want of such tender the sheriff doth execute the *return. habend.* and afterwards the costs and damages are paid, a writ *si constare poterit* lies upon suggesting that the costs, &c. are paid, and this is to redeliver the distress, and is called a *writ of restitution*. Cro. Car. 162. 3 Salk. 54.

Of the costs of
the issues ac-
cording to
4 Ann. c. 16.

It is now settled that pleadings in replevin are within the stat. 4 Ann. c. 16.; therefore, where some issues in the replevin are found for the plaintiff, which entitle him to judgment, and some for the defendant, the defendant must be allowed the costs of the issues found for him out of the general costs of the verdict, unless the judge shall certify that the plaintiff had probable cause for pleading the matters on which those issues are joined. *Dodd v. Joddrell*, 2 T. R. 235.

An avowant shall pay costs on the special avowries found against him. *Stone v. Forsyth*, Doug. Rep. 709.

And shall not have costs on the affirmance of a judgment in his favour on a writ of error. *Ibid.*

The stat. 11 Geo. 2. c. 19. s. 22. gives the defendant or defendants in *replevin* making avowry, or consuance upon distresses for rent, relief, heriot, or other service, in case the plaintiff in the action shall become nonsuit, discontinue, or have judgment against him, double costs.

Of double costs under 11 Geo. 2. c. 19.

But where the defendant avowed the taking and detaining an ox, as a seizure for *heriot custom*, (claiming no right to distrain,) and plaintiff became nonsuit, and the prothonotary had allowed defendant double costs, taking the case to be within the stat. 11 Geo. 2. the court, on motion that the prothonotary might review his taxation, made the rule for that purpose absolute; holding that the avowry not being for taking the ox as a *distress*, is out of the statute. For heriot service, cattle, &c. are distrainable; for heriot custom not. *Lloyd v. Winton*, Barnes, 148. 2 Willf. 28.

For further information on costs in *replevin*, see Hullock's Law of Costs.

IV. Of the *Scire Facias*.

A *scire facias* is not an original but a judicial writ, founded on some matter of record, as a judgment, recognizance, or letters patent, on which it lies, either to enforce the execution of them, or to vacate or set them aside. But though strictness it is a writ judicial or of execution, yet in a certain degree it is in the nature of an original, and is therefore properly called an action, so that a release of all actions or executions is a good plea in bar to a *sci. fa.*, and upon this ground it is that a plea to a *sci. fa.* should conclude, "if the plaintiff ought to have or maintain his action," &c. 2 Willf. 251. *Fenner v. Evans*, 1 D. & E. 267.

Sci. fa. what.

It is an action.

A *scire facias* lies for many purposes in law, the writ being formed according to the subject-matter. But the writs of *sci. fa.* proper to be noticed in this work are—the *sci. fa.* against bail after judgment had against the principal on their recognizance forfeited, and the *sci. fa.* to revive judgments, and to continue suits.

In what cases it lies.

Of the proceedings by *sci. fa.* against bail, we have already treated: see Ch. XV. Sec. iv. It only remains to consider of the *sci. fa.* to revive judgments and continue suits, which may be divided into the following heads:—

SEC.

SEC. 1. *Of the Scire Facias to revive a Judgment, by and against the same identical Parties to the Suit on which the Judgment was had.*

SEC. 2. *Of the Scire Facias to revive a Judgment by or against the Representatives of either Party dying after Judgment and before Execution.*

SEC. 3. *Of the Scire Facias to continue a Suit by or against the Representatives of either Party dying before final Judgment.*

SEC. 4. *Of the Scire Facias to revive Judgments or continue Suits, where the Parties are changed either by Bankruptcy or Marriage.*

SEC. 5. *Of the practical Proceedings by Scire Facias in all the above Cases.*

SECTION I.

Of the Scire Facias to revive a Judgment by and against the same Parties.

Scire facias an action within 17 Geo. 3.

It has been just observed that a *sci. fa.* is an action; for this reason a *sci. fa.* to revive a judgment is within the clause of the annuity act 17 Geo. 3. c. 26. commanding that no action shall be brought on any judgment already entered. *Fenner v. Evans*, 1 D. & E. 267.

It is properly a continuation only of an action.

But properly speaking, a *scire facias* to revive a judgment is only the continuation of an action. It is a step leading to the execution of a judgment already obtained; it is but the enforcing of the original demand for which the action was brought. In a word, the *sci. fa.* to revive judgments, creates nothing anew, but may be said only to reanimate that which before had existence, but whose vital faculties and powers are, as it were, suspended, and, without the salutary interference of the *sci. fa.*, would be wholly lost.

Bankrupt not liable to costs of *sci. fa.*

It is upon this ground, (*viz.* that a *sci. fa.* is only the continuance of an action,) that if a bankrupt be discharged from the original judgment, so he will from the costs of the *sci. fa.* though the latter were sued out after his bankruptcy. *Philips v. Brown*, 6 D. & E. 283.

Any agreement in the original action binding in proceedings on *sci. fa.*

So, if in the original action the plaintiff agrees not to bring a writ of error, his representatives upon the judgment being revived against them by *sci. fa.* shall be bound by such agreement. *Executors of Wright v. Nutt*, 1 D. & E. 388.

It

It was formerly doubted whether a *sci. fa.* to revive a judgment lay at common law, but this doubt, says Lord Coke, arose for want of distinguishing between personal and real actions. 2 Inst. 409. In real actions, if execution was not sued within the year, a *sci. fa.* lay for the land, because no other advantage could be taken of the judgment, as an action of debt could not be maintained thereon; but in personal actions the party had a remedy by action of debt on the judgment, therefore no *sci. fa.* could issue; so in mixed actions, as an assize, writ of annuity, and ejectment, a *sci. fa.* lay. But the *sci. fa.* in all personal actions is given by stat. Westm. 2. c. 45.

How far *sci. fa.* lay at common law.

How given by statute.

Now, therefore, after judgment obtained in a personal action, whether obtained by plaintiff or defendant, for a judgment of nonsuit is governed by the same rule, if the execution is not sued out within a year and a day after signing the judgment, no execution can go until a *sci. fa.* is sued out to revive the judgment, and a judgment on such *sci. fa.* has been obtained; except in the case of the king, when there need not be any *sci. fa.* 2 Sal. 603. Ray. 328.

How now used when judgment a year old.

A year and a day is certainly ample time for the party who has obtained judgment to carry it into effect, and if he neglects so to do, it is but just that proper notice should be given to the other side of his intention to put it in force, that he may not be taken by surprise; and this is the use and meaning of the proceedings by *sci. fa.*

For this reason, if the delay is not occasioned by the party entitled to the judgment, but by the defendant himself; or if it were by agreement between the parties, then execution may issue without any such *sci. fa.* See Ch. xii. (B), tit. Execution, for cases on this head.

Un'ess delay occasioned by defendant.

As if there be a *cesset executio*; but then execution must issue within a year after the *cesset executio* is determined.

Or by cesset executio.

But if execution were sued out within the year and returned, but from which the plaintiff had no benefit, there needs no *sci. fa.* afterwards, but that execution may be continued down on the roll, by *vicecomes non misit breve* to any distance of time; but the writ of execution must be returned by the sheriff and filed, or such continuances cannot be entered. *Blayer v. Baldwin*, 2 Wils. 83. Bar. 213. Carth. 283. 2 Show. 235. *Aires v. Hardress*, Str. 100.

Or writ of execution has been sued out and returned.

In like manner, if the plaintiff delay executing a writ of inquiry, till a year after the interlocutory judgment, there must be a *sci. fa.*

How in cases of writ of inquiry.

If the plaintiff does not proceed upon the first *sci. fa.* within a year and a day, he cannot afterwards proceed on that

The *sci. fa.* must be proceeded on with writ, in the year.

writ, but must sue out a new *sci. fa.* for the old writ is discontinued.

Execution
without *sci. fa.*
only voidable.

An execution had, after a year and a day, without a *sci. fa.* is not void, but voidable. 3 Lev. 140. Sal. 273.

For the manner of suing out the *sci. fa.*, appearing thereto, and proceeding in the action, see *post*, Sec. v.

SECTION II.

Of the Scire Facias to revive a Judgment by or against the Representatives of either Party dying after final Judgment.

If same parties
to the suit not
alive, *sci. fa.*
must issue be-
fore execution.

When a judgment has been obtained, it is not only necessary that the fruits of such judgment should be reaped by suing out execution in due time, namely, within the year and day, but also that at the time of such execution issuing, the same persons who were the parties to the suit should be living; if therefore after such judgment, but before execution, either the plaintiff or defendant dies, judgment must be revived by *sci. fa.*, by or against the representative of the deceased, before any execution can issue. 2 Ld. Ray, 768. Lutw. 1273.

How if plaintiff
die.

And if the plaintiff in the action dies, his representatives must prove the will, or take out letters of administration, (as the case may be,) before such *sci. fa.* is sued out. 6 Mod. 134. 7 Mod. 15.

If defendant die
in the vacation.

But if the defendant die in the vacation, and the judgment be not a year old, it is said, the plaintiff may levy without a *sci. fa.* Imp. C. B. 510. K. B. 431. 1 Sal. 87. 2 Str. 1081.

Though in a late case, where judgment on a warrant of attorney was entered in Easter vacation against a defendant who died in Easter term, the judgment was held good, because it related to the first day of the antecedent term, but it was held that execution could not be taken out upon it, until it was revived by *sci. fa.* against the defendant's executor. *Heapy v. Parris*, 6 D. & E. 368.

If *sci. fa.* he
sued out before
their death.

So, if a writ of *fi. fa.* be actually sued out, but before execution thereof defendant dies, there is no need of a *sci. fa.*, but the goods may be seized under that writ in the hand of his representative. *Farrer v. Brooks*, 2 Crom. 105.

If it be a joint
action and one
dies.

If it be a joint judgment against two, and one of the defendants die, a *sci. fa.* lies against the other alone, reciting the death. 4 Bac. Abr. 419.

But it is said, that if the action be by two, and one of the defendants die after judgment, execution may be sued in the
name

name of both without a *sci. fa.* Noy, 150. Show. 404. Carth. 194.

If an executor or administrator obtains judgment and dies before execution, the administrator *de bonis non*, &c. shall have a *sci. fa.* upon such judgment. Stat. 17 Car. 2. c. 8. Cro. Car. 167. If executor obtains judgment and dies.

If an administrator *durante minoritate* brings an action and recovers, and then his time determines, the executor may have a *sci. fa.* upon that judgment. Lev. 181. 2 Vern. 25. Or administrator *durante minoritate*.

If there be several executors and one an infant, who therefore cannot prove the will, those of full age who have proved may bring the *sci. fa.* and it shall be good. *Hatton v. Masfall*, 1 Lev. 181. 2 Saund. 212. If several executors and one an infant, how *sci. fa.* may go.

If an executor brings a *sci. fa.* on a judgment, or a recognizance, and gets a judgment *quod habeat executionem*, and dies intestate, the administrator *de bonis non* must bring a *sci. fa.* upon the original judgment, and cannot proceed upon the judgment in the *sci. fa.* 1d. Raym. 1049. If executor gets judgment on *sci. fa.* and dies.

For the manner of suing out *sci. fa.*, appearing thereto, declaring thereon, &c. see *post*, Sec. v.

SECTION III.

Of the Scire Facias to continue a Suit by or against the Representatives of either Party dying before final Judgment.

At common law, the death of either party at any time pending the action, *i. e.* before final judgment obtained, abated the suit, even though it happened after verdict, or judgment by default; and if it were a joint action, the death of any one of the plaintiffs or defendants abated it. How suit abated at common law by death of either party.

But now in all cases of joint actions, if one of the plaintiffs or defendants die pending the action, the suit shall not abate, but the suggestion may be entered on the roll of such death, and the proceedings may be continued without any *sci. fa.* in the name or names of the survivors. Stat. 8 & 9 W. 3. c. 11. s. 7. How altered in joint actions by Stat. 8 & 9 W. 3.

And if the action is not a joint one, and the plaintiff or defendant should die pending the suit, yet if such death happen after verdict or interlocutory judgment, the suit shall not abate, but may still be continued to execution by or against the representatives of the party deceased. How in other cases by Stat. 17 Car. 2. c. 8. and 8 & 9 W. 3. c. 11.

But

But if such death happens before verdict or interlocutory judgment, the suit still abates.

(A) (A) How if Plaintiff or Defendant die after Verdict and before Judgment.

First, if either party die between the verdict and judgment, stat. 17 Car. 2.

By the 17 Car. 2. c. 8. In all actions personal, real, or mixed, the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict.

And "where any judgment after a verdict shall be had by or in the name of any executor or administrator, in such case, an administrator *de bonis non* may sue forth a *scire facias* and take execution upon such judgment."

In case, therefore, of the death of the party after a verdict, but before judgment, the judgment must be entered within two terms after the verdict, it is entered generally as if the party were living; and a general *sci. fa.* not a special one, is sued out by or against the representative of the deceased, to shew cause why execution should not issue. *Ld. Ray.* 1280.

But though the judgment is warranted by the statute, and is entered in the name of the deceased, yet if execution be taken out without a *sci. fa.* it will be set aside. *Carl v. Brown*, 1 Will. 302.

If either party die after the assizes begin, though before the trial and verdict, it shall be within the statute, because the assizes are but one day in law. *Ld. Ray.* 1415.

(B) (B) How if either Party die after Interlocutory and before final Judgment.

Secondly, if either party die after interlocutory and before final judgment, stat. 8 & 9 W. 3. c. 11. f. 6.

By the 8 & 9 W. 3. c. 11. f. 6. it is enacted, "That in all actions commenced in any court of record, if any plaintiff happen to die after an interlocutory judgment, and before a final judgment obtained therein, the said action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by the executors or administrators of such plaintiff; and if the defendant die after such interlocutory judgment and before final judgment therein obtained, the said action shall not abate, if such might be originally prosecuted or maintained against the executors or administrators of such defendant: and the plaintiff, or if he be dead, after such interlocutory judgment, his executors or administrators, shall and may have a *sci. fa.* against the defendant, if living after such interlocutory judgment; or

" or if he died after, then against his executors or administrators, to shew cause why damages in such action should not be assessed and recovered by him or them; and if such defendant, his executors or administrators, shall appear at the return of such writ, and not shew or allege any matter sufficient to arrest the final judgment, or being returned warned, or upon two writs of *sci. fa.* it be returned, that the defendant, his executors or administrators, had nothing whereby to be summoned, or could not be found in the country, shall make default; that thereupon a writ of inquiry of damages shall be awarded, which being executed and returned, judgment final shall be given for the said plaintiff, his executors or administrators, prosecuting such writ or writs of *sci. fa.* against such defendant, his executors or administrators respectively."

The former statute, 17 Car. 2. makes the judgment good, as entered between the parties themselves to the suit, though one died after the *verdict*, and before the judgment entered.

But by the stat. of 8 & 9 W. 3. if a defendant dies after interlocutory judgment, the final judgment must be against the representatives, for they are expressly taken notice of for that purpose; and the *sci. fa.* against them must appear on the same record. Salk. 42.

If a defendant dies after a writ of inquiry executed, and before the return thereof, it is within this act; and the *scire facias* against his executor or administrator must be to shew cause why the damages assessed should not be recovered. *Goldsworthy v. Southcot*, B. R. 1 Will. 243. 1 D. & E. 388. *Executors of Wright v. Nutt*.

The defendant died after the rule was out, but before the time given to plead by a judge's order expired; and the plaintiff signed an interlocutory judgment, and sued out a *sci. fa.* against the defendant's executor upon this statute, to shew cause why damages should not be assessed and recovered; but on motion, the court set aside the proceedings for irregularity, as the writ abated by the death of the defendant before interlocutory judgment was signed, notwithstanding the rule to plead was out. And so held in *Sibert v. The Executor of General Ruffel*, Mich. 9 Geo. 2. *Wallop v. Irwin*, 1 Will. 315.

For the manner of suing out *sci. fa.* appearing thereto, declaring thereon, &c. see *post*. Sec. v.

SECTION IV.

Of the Scire Facias to revive Judgments, where the Situation of the Parties is changed by Marriage or Bankruptcy.

If the parties to the suit change their situation as to legal responsibility, *sci. fa.* necessary.

It is not only necessary that the parties to the record should be alive at the time of the execution, but that they should not have altered their situation so as to have changed their legal responsibility; as in case of a *feme sole* marrying, after judgment and before execution; or of either party becoming a bankrupt.

(A)

As first, by marriage.

Judgment by *feme sole*, who afterwards marries and dies.

Judgment against *feme sole*, who afterwards marries and dies.

Judgment by baron and *feme*, and *feme* dies.

Judgment by *feme sole* executrix, who afterwards marries and dies.

Judgment on plea of coverture, how baron to get costs.

(A) Of the Marriage of the Party.

If a judgment be recovered by a *feme sole*, and she before execution taken out marries, the husband and wife must sue out a *sci. fa.* and get judgment thereon, *quod habeant executionem*; and if after such judgment, but before execution, the wife dies, the husband alone may have a *sci. fa.* and go on to execution. *Woodyer v. Fresbam*, Salk. 116. Com. 455.

So, *vice versa*, if judgment be recovered against a *feme sole*, and she marries, a *sci. fa.* must be sued out against the husband and wife, and judgment had against them; and if the wife then dies, a new *sci. fa.* may issue against the husband only, and he will be chargeable, though he was not liable upon the first judgment. *Carth.* 36. Salk. 116. 1 Mod. 170.

If husband and wife obtain judgment, and the wife dies, the husband, without taking out administration to her, may have a *sci. fa.* *Cro. Eliz.* 844. 3 Mod. 188. 2 Leon. 14.

The principle in all the above cases is, that by the judgment on the *sci. fa.* it becomes a debt of the husband's.

But if a *feme sole* be executrix of another, and as such executrix recovers judgment, and then marries, and a *sci. fa.* be sued out by the husband and wife, as such executrix, and judgment had thereon; if the wife afterwards die, the husband cannot sue out a *sci. fa.* alone, and have execution for such debt, as his own proper debt, because the judgment does not make it such, but it belongs to the succeeding executor or administrator *de bonis non*, as assets of the original testator's estate. *Cro. Car.* 207. *Beaumont v. Long*.

If an action be brought against a married woman, and she pleads her coverture, which is found for her, the husband cannot

cannot have execution for the costs without a *sci. fa.* *Wortley v. Rayner.* Doug. 637.

(B) Of the Bankruptcy of the Party.

(B)

Another case in which a *sci. fa.* may be necessary from the party having changed his legal responsibility, is that of bankruptcy. Secondly, by bankruptcy.

If a plaintiff become bankrupt any time after the commencement of a suit, and before interlocutory or final judgment, the proceedings should be continued till judgment in the name of the bankrupt; for the assignees cannot make themselves parties in any intermediate stage of the proceedings, but immediately after judgment, even an interlocutory one, they may; so that, after interlocutory judgment, they may either sue out a *sci. fa.* in their own names against the defendant, to shew cause why a writ of inquiry should not issue, or they may continue their suit till judgment, and afterwards sue out a *sci. fa.* and take out execution, or they may proceed to judgment and execution, without any *sci. fa.* in the name of the bankrupt. The last is the best and quickest mode. *Waugh v. Austin*, 2 D. & E. 437. *Bibbins v. Mantel*, 2 Wil. 358.

If plaintiff become bankrupt, how assignees may proceed by *sci. fa.* or in the name of bankrupt.

Thus where the plaintiff after judgment and a writ of error allowed, became a bankrupt, his assignees cannot become parties by suing out a *sci. fa. quare executionem non* in their own names, to compel an assignment of errors. *Kretzman v. Breyer*, 1 D. & E. 463.

When assignees may be made parties.

Plaintiff obtained a judgment and afterwards brought a *sci. fa.* and had judgment thereon, and then became bankrupt. The commissioners assigned the judgment to a stranger, who moved the court that it might be entered so as to entitle him to the benefit of the judgment on the *sci. fa.* without a new *sci. fa.*, and it was ruled accordingly. *Plumer v. Lee*, 5 Mod. 88.

How court will relieve the assignee of a judgment.

The assignees of a bankrupt cannot proceed by *sci. fa.* on a judgment, whilst error is depending thereon. *Assignees of Kiffin v. Leonard*, Ld. Raym. 1295.

No proceedings by *sci. fa.* pending error.

If the bankruptcy be disputed, and the assignees move the court for money levied on an execution by a bankrupt to be brought into court, on the ground that the judgment was assigned to them as assignees, the court will detain the money till a *sci. fa.* is brought to try the bankruptcy. 2 Wil. 372.

When court will on motion detain money levied by a bankrupt.

A declaration on a *sci. fa.* by the assignees of a bankrupt, stating that he became a bankrupt within the meaning of the statutes, &c., and that his goods and effects were afterwards

What declaration on *sci. fa.* by assignees good.

in due manner assigned to the plaintiffs, is sufficiently certain, without alleging that the party was declared a bankrupt, or that his effects were assigned by deed. *Winter v. Krehman*, 2 D. & E. 45.

For the manner of suing out *sci. fa.* appearing thereto, and proceeding thereon, see next Sec. v.

SECTION V.

Of the Proceedings in the Action of Scire Facias in all the above Cases.

When *sci. fa.*
may issue.

A *sci. fa.* may issue of course at any time within seven years from the signing of the judgment.

Without motion.

If the judgment be above seven, but not ten years standing, there must be a side bar motion in treasury, (no affidavit necessary,) and a rule got at clerk of rules in K. B. and secondary's in C. B. But it need not be served on defendant or his attorney.

When motion
necessary.

But if the judgment be above ten years old, the plaintiff must in K. B. move the court, on an affidavit of the debt being due; the judgment unsatisfied and the defendant living, (or as the case may be,) it is a rule to shew cause. But in C. B. no such affidavit is necessary, but it is a motion of course signed by a serjeant; but then there must be a *scire feci* returned to such *sci. fa.*, or an affidavit of personal notice to the defendant.

But if the judgment in C. B. be above twenty years old, there must be an affidavit and rule to shew cause as in K. B. *Coysgarne v. Fly*, 2 Blac. 995.

If after the above motion the judgment is revived, and then defendant dies before execution, the plaintiff must sue out a new *sci. fa.*, but he may have it without motion, the judgment being revived before. Salk. 598.

In K. B. two
nihilis always
requisite.

In the King's Bench, and in all cases, there must be either one *sci. fa.* with a *scire feci* returned, or two *sci. fa.*'s with *nihilis*. 2 Inst. 472. 2 Mod. Cas. 227.

In C. B. in cer-
tain cases, one
nihil sufficient.

But in C. B. whenever the *sci. fa.* is to revive a judgment against the same defendant who was party and privy to the judgment, one *scire facias* is sufficient though a *nihil* be returned thereto. Dyer, 186. Salk. 599.

In other cases
two.

But not so where the defendant is not party to the record.

Of the teste and
return in both
courts.

The time, however, between the *teste* and return in both courts is in effect the same; for in C. B. the one *sci. fa.* must have fifteen days between the *teste* and return, whereas in K. B.

K. B. there must be fifteen days between the *teste* of the first and the return of the second *sci. fa.* So in C. B., where two *sci. fa.*'s are necessary.

Although the intent of the *sci. fa.* is to give the party against whom execution is about to issue, notice or warning thereof, yet by the general practice it is wholly defeated, for the defendant may be summoned or not, as the party thinks fit; and indeed the usual way is to revive the judgment without giving the party any notice.

In general, no notice given on *sci. fa.*

No *alias sci. fa.* must issue till the first writ of *sci. fa.* be returnable. R. T. 8 W. 3.

Of the *alias sci. fa.* in both courts.

And in C. B. not until the appearance-day of the return of the first.

The *alias* shall bear *teste* the day of the return of the first. Salk. 599.

And in C. B. on the appearance-day of the return of the first.

If only one *sci. fa.* and a *scire feci* in K. B., such *sci. fa.* should have fifteen days between the *teste* and return.

So must every *sci. fa.* when proceedings by original; but if inclusive both of *teste* and return, it is good. Salk. 599, 2 Jones, 228.

How if proceeding by original.

And the *alias sci. fa.* by original, must be tested on the appearance-day of return of first.

If plaintiff means to proceed without giving notice to defendant, let him in K. B. sue out *sci. fa.* on a 2s. 6d. stamp parchment; get it signed and sealed; leave it at sheriff's office any time before the return thereof; R. E. 5 Geo. 2.;

Of the manner of proceeding if the party is not to be summoned.

one day before is sufficient; upon the return-day sue out an *alias*, sign and seal it, leave it at sheriff's office four days exclusive before the return thereof; R. E. 5 G. 2. They must be the last four days; 4 D. & E. 583. On the return-day of *alias*, give a rule at the clerk of the rules, on plain paper, thus, *A. B. v. C. D. rule on sci. fa.*; it expires four days exclusive of the day it is given, and if the defendant does not appear, get *sci. fa.* from the sheriff's office, make entry on roll as far as sum recovered, get the roll and the two *sci. fa.*'s marked by clerk of judgments, and then sue out execution.

In K. B.

If the *sci. fa.*'s be returnable different terms, make the entry as directed *ante*, p. 48. if in K. B. and p. 49. if in C. B.

In C. B. engross writ of *sci. fa.* on 2s. 6d. stamp parchment; get it signed by prothonotary and sealed. Indorse the attorney's name and place of abode thereon and the day it is sued out, with, "to be returned *nihil*." Leave it at sheriff's office, when returnable call for it, give rule at prothonotary's to appear; it is a four-day rule; at the expiration thereof

In C. B.

thereof search the book for appearance, if none to be found, make the entry on a roll, which take to prothonotary, who will sign judgment; file writ of *sci. fa.* with *custos brevium*, and sue out execution.

Of the proceeding if defendant is to be summoned.

Of the appearance and subsequent proceedings.

In what court *sci. fa.* to be brought.

What *sci. fa.* should shew when judgment was in an inferior court and removed by *certiorari*.

What executor, &c. can plead to *sci. fa.*

How relieved on motion, if no opportunity to plead.

Of proceeding against executor or administrator in cases of *devastavit*.

If the plaintiff wishes to have the defendant summoned, proceed as directed *ante*, p. 47.

So also, for the appearance to the *sci. fa.* and the declaration and subsequent proceedings, see *ante*, p. 48. and the Observations to Sec. iv. Ch. xvi.

The *sci. fa.* must be brought in the same court where the original proceedings were, and the *testes* and returns of the writs must be as the original action was by bill or original.

If the judgment of an inferior court is removed into B. R. by *certiorari*, and the party sues a *sci. fa.* to have execution upon such judgment, he ought to shew in his *sci. fa.*, that it is the judgment of such an inferior court removed thither by *certiorari* and ought to shew the particular limits of the inferior jurisdiction, and pray execution within the particular limits. But if the judgment be removed into B. R. by writ of error, and affirmed, the party may have execution in any part of England; for by the affirmance it has become the judgment of the King's Bench. But in a *sci. fa.* upon such judgment affirmed, the plaintiff ought to allege, that it was removed thither by writ of error. *Ld. Raym.* 216.

To a *sci. fa.* against an executor or administrator, he can make no other defence by way of plea than the party himself, if alive, could have done, which can only be a release or other matter in bar arising, *puis darrien continuance*. *Salk.* 315.

And if he omits to plead such matter, he shall not have an *audita querela*. 1 *Wil.* 98.

But where the party has a matter which he might have pleaded to the *sci. fa.* in his discharge, and *two nibils* are returned, and judgment against him, the court will relieve him upon motion, without putting him to an *audita querela*. *Aliter* in case a *seire feci* be returned. *Anon.* *Salk.* 93.

Formerly the method was, upon obtaining judgment by default against an executor or administrator, (which would reach only the goods of the testator or intestate,) and *nulla bona* returned to a *fi. fa.* sued out on such judgment, to issue a writ to inquire whether the defendant had wasted any of the effects of the deceased; and if a *devastavit* was found by the inquisition, and returned thereto, then for the plaintiff to proceed by *sci. fa.* for the defendant to shew cause why the plaintiff should not have judgment *de bonis propriis*; to which *sci. fa.* the executor or administrator could appear and plead *plene administravit* [as in the case above]. — But now the *seire facias*

facias

facias inquiry and the *sci. fa.* are incorporated, and made out in one writ for expedition. However, this method, though much better than the old one, is seldom pursued at this day, as it does not answer to the plaintiff if the debt is but a small one, because no costs are allowed against the executor or administrator, unless they appear and plead to the *sci. fa.* and it be found against them. But the way is to bring an action of debt on the judgment, suggesting a *devastavit*.

A *sci. fa.* on a judgment must pursue the terms of the judgment. And therefore, where an executor pleads *plene administravit* and the plaintiff does not take issue on it, but takes a judgment of assets *quando acciderint*, the *sci. fa.* on that judgment must only pray execution of such assets as have come to the executor's hands since the former judgment, and if it pray execution of assets generally, without confining it to that time, it cannot be supported.

Sci. fa. must follow judgment.

But if the executor receive assets between the time of the plaintiff's suing out the writ in the first action, and the judgment of *quando acciderint*, the court will permit the plaintiff to amend his judgment as to the time, by making it a judgment as of that term, when he could at the soonest have entered it up, unless the defendant can shew that in point of fact some injustice will be done by it in the particular case.

But court will in certain cases permit the judgment to be amended.

Mara v. Quin, 6 D. & E. 1.

CHAPTER XV.

Of Proceedings in Real Actions.

HAVING shewn the mode of proceeding in all common actions, and in some particular actions, as well personal as mixed, it may be useful, in the next place, to treat of the proceedings in such *real* actions as are in most general use, and in certain cases must still be resorted to, Such as,

SEC. 1. *Dower.*

SEC. 2. *Partition.*

SEC. 3. *Quare Impedit.*

SEC. 4. *Right, Writ of.*

SEC. 5. *Waste.*

SECTION I.

Of Dower.

What.

Dower is that part of the husband's estate which comes to the wife after the death of the husband.

Who entitled to it.

Every wife by law is entitled to be endowed of all lands and tenements, of which her husband was seised in *fee simple* at any time during coverture, or in *fee tail* general, or as heir in *special tail*, and of which any issue, which she might have had, might by possibility have been heir.

Of what dower shall be.

And she shall be endowed, as well of lands, &c. where the husband had a *seisin in law*, as an *actual seisin*. Co. Lit. 31. a.

And a widow shall be endowed of all her husband's lands, tenements, and hereditaments, *corporeal* or *incorporeal*, unless there be a special reason to the contrary: for of a castle built for defence of the realm she shall not be endowed, nor of a common without stint—nor of a copyhold estate, unless by the custom of the manor: and then it is not called dower, but her *free bench*.

Where dower is allowable, it matters not, though the husband aliens the land during coverture: for he aliens it liable to dower.

Must be actual wife.

She must be the actual wife of the party at the time of his decease: so that, if she has been divorced *a vinculo matrimonii*,

nisi, she is not entitled to dower. But if she were divorced *a mensa et toro* only, though it were for adultery, by the common law she should have her dower; yet now by statute Westm. 2. if a woman elopes from her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled.

Widows of traitors are barred of dower, by stat. 5 & 6 Edw. 6. c. 11. (except in certain treasons relating to the coin), but not the widows of felons.

An alien widow of a subject cannot be endowed.

And to be entitled to dower, the wife must be above *nine* Of what age. years old at the death of her husband.

Dower varies according to the particular custom of the place; in general it is a third, but if the lands be *gavelkind*, it is a *moiety*. To what extent.

Dower ought to be assigned to the widow within forty days after her husband's death; and by law she has the privilege of staying in the capital mansion, or some house whereof she is dowable, for forty days after her husband's death, (the day of his death being accounted one,) which is called the widow's *quarantine*; during which time she is to be supplied with all necessaries at the expence of the heir; and before the end thereof, is to have her dower assigned her; and this privilege is confirmed by Magna Charta, c. 7. When to be assigned.

A widow may prevent her dower, or forfeit the same by her own act; the first case happens, when she detains the charters of title-deeds and evidences of the estate from the heir; in which case she is not entitled to dower till she restores them. And the latter happens when, after assignment, the dowager aliens the land assigned her for dower; in which case she forfeits her dower *ipso facto*, and the heir may recover it by action by statute of Gloucester. How prevented or forfeited.

There are three things requisite to entitle a person to dower, *viz.* marriage, seisin, and the death of the husband. The three things requisite.

A woman entitled to dower cannot enter till it be assigned to her, and set out either by the *heir*, *terre-tenant*, or sheriff (after recovery thereof by action) in certainty. Roll. Abr. 681. Dy. 346. Plow. 549. Brook, 18. Co. Lit. 34. a. 37. a. b.

Tenancy in dower, or an action for dower, seldom happens at this day, dower being generally barred by a *jointure* (as regulated by the statute of uses, 27 Hen. 8. c. 10.) made upon preconcerted marriages, or where the estate is considerable. Action of dower seldom brought now. Why.

But where it is not barred by any marriage settlement, if the heir or his guardian do not assign the widow her dower within the

the term of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it.

Of the writ of
admeasurement
of dower.

If the heir, (being under age,) or his guardian, assign more than she ought to have, it may be afterwards remedied by writ of *admeasurement* of dower. Co. Lit. 34.

Of the different
kinds of dower.

There were five kinds of dower; 1. Dower *de la plus bealle*, which was abolished with the military tenures. 2. Dower by the *common law*. 3. Dower by *particular custom*, as that the wife shall have more than a third or less, or the whole. 4. Dower *ad osium ecclesie*. And 5. Dower *ex assensu patris*, which is only a species of the last. But the only usual species of dower at present subsisting, is dower by the *common law*; in treating of which we will consider

(A) The Process in Dower.

(B) The Appearing, Counting, &c.

(C) The Demanding a View.

(D) The Pleadings.

(E) The Judgment both by Default and final,

(A)

(A) Of the Process in Dower.

Different writs
in dower.

Dower may be recovered by writ of *dower unde nil habet*, or by writ of *right of dower*. The latter is proper when the wife has already dower of *part* in the same ville: for then she cannot have a dower *unde nil habet* against the same tenant. Com. Dig. tit. Dower, which is only when the whole is withheld.

Of the unde
nil habet.

The writ of dower *unde nil habet* may be sued in the Common Pleas, or in the county by *justices*, or upon a *special custom by plaint*; but it is usually commenced in the Common Pleas.

A *præcipe* must be made out for the original writ, which is in the following form:

“ Berklhire, to wit. Command E. F. that justly, &c. he
“ render to Ann B. widow, who was the wife of John B.,
“ her reasonable dower, which falleth to her out of the
“ freehold which was of the said John B. heretofore her
“ husband, in the parishes of O., P., Q., and R, whereof
“ she nothing hath, as she says.

“ Returnable in eight days of the
“ Purification of the Blessed
“ Virgin Mary.”

For

For forms of the original writ, vide the books of entries, &c.

The writ was, *Command B. that he render A. her reasonable dower of lands, &c. late of C. her husband; and because the writ did not say, Command B. that he render A. who was the wife of C. &c.* the writ was held ill. Cro. Car. 217.

When the original writ is obtained, the process upon it is a summons, which is to be served upon the tenant or upon the land: after which, fourteen days before the return thereof, proclamation must be made of that summons on a Sunday, at or near the most usual door of the church or chapel of the town or parish where the lands lie; and that proclamation must be returned, together with the names of the summoners, pursuant to 31 Eliz. c. 4., for without it no grand cape can be awarded, but an alias and pluries summons.

Of the summons on the writ.
Proclamation.

The proclamation, by the statute 31 Eliz. ought to be made at the parish church door, though it be in another county than where the land lies. Cro. Eliz. 472.

At the return of the summons, defendant may cast an *essoign*.

Essoign.

If the tenant casts an *essoign*, at the return of the summons, it must be entered upon the *essoign*-day of the same return.

And if no *essoign* be then entered upon the day of exceptions, the defendant may enter a *ne recipiatur*.

The return by the sheriff is in this form:

"Pledges of prosecuting } John Doe,
Richard Roe.

Return of the sheriff.

"I have commanded the within-named and at
"the great and common door of the parish church of
"within written, upon the Lord's day, (to wit,) on the
"day of within written, immediately after divine
"service and preaching ended, I have made public proclama-
"tion according to the form of the statute, and as this writ
"itself commands and requires.

"Summoners of the within-named } W. W. Esq.
"E. F., R. S., and T. W. } sheriff."

Upon the return of the summons, if the tenant does not appear, or cast an *essoign*, or if an *essoign* is cast, and at the day given by adjournment of the *essoign*, the tenant does not appear, the next process is the writ of *grand cape*. But then, before the *grand cape* issues, the demandant shall make her demand, for no certainty appears before the demand made. Brook. 96.

Grand cape.

The writ of *grand cape* commands the sheriff to seize the third part of the lands, &c. demanded; or, if the same are *gavelkind*, to seize the moiety, &c. by the view of two honest and

and lawful men of the county, and to summon the tenant, &c.

For the form of the writ, *vide* the books.

Alias grand
cape.

If the sheriff does not return the writ, an *alias grand cape* goes, at the return of the *grand cape*: and if the tenant alleges, that he was not able to come, it does not save his default. R. 3 Leon. 2.

So, if *nulla tenementa*, &c. be returned, a *testatum grand cape* issues.

If the sheriff executes the writ, the return is in this form :

Sheriff's return
thereto.

"By virtue of this writ to me directed, on the
"day of January in the year within written, I have taken
"into the hands of our lord the king, by the view of A. B.
"and C. D. honest and lawful men of my county, the third
"part of the lands and tenements within mentioned, with
"the appurtenances, as I am within commanded.

"Summoners of the within-named } W. W. Esq.

"E. F., R. S., and T. W. } sheriff."

Tenant waging
law.

If the tenant appears, he may wage his law of *non summons*, &c. If he does not wage his law, there shall be final judgment against him. Com. Dig. 5 vol. 240.

Strictness re-
quired in mak-
ing proclama-
tion.

In dower of lands in L., M., and N. the sheriff returns pledges of prosecuting A. B., C. D., and the names of the summoners E. F., G. H., and that after the summons made, and fourteen days and more before the return of it, at the most usual church door of L., where part of the lands lay, such a Sunday after sermon ended, be publicly proclaimed, all and singular the things contained in the writ, to be proclaimed according to the form of the statute in that case made, and indorsed his name to the return. To which an exception was taken, because proclamation was not made at all the church doors; but *per cur.* proclamation at any one of them is sufficient; but the return was held ill; because, he says, he had proclaimed all and singular the things in that writ contained, without saying what. Hob. 133.

Motion was made to set aside the *grand cape*, proclamation not having been made fourteen days before the return of the summons, according to the 31 of Eliz. the summons was returnable on the morrow of All Souls, and the proclamation was made the 27th October, which was but six days before the return. The court made a rule to shew cause, which was afterwards made absolute, no cause being shewn.—Barnes, 1.

(B) Of

(B) Of Appearing, Counting, &c. in Dower.

(B)

If the tenant appears upon the summons, &c. he may vouch the heir to warranty.

Or if the tenant appears upon the summons, or on the adjournment of the *essoign*, or if he appears at the return of the *grand cape*, and the defendant releases the default, the demandant shall count upon her writ. Co. Ent. 271. a.

The count shall be of a third part of such a messuage, &c. for if it be of three messuages, &c. where there are several, and three is the third part of all, it is bad. 3 Lev. 169. But *quere*, if it cannot be amended? *Ibid*.

What the count should be for.

If dower is demanded of lands of the nature of *gavelkind*, it must be of a moiety *dum sola et casta*; for if the plaintiff demands a third part, it is a good bar that the land is *gavelkind*. 1 Leon. 133.

The count must describe the lands so certain, that seisin may be given by the sheriff, and therefore of a third part of three tenements is bad. 2 Mod. 355.

How lands described.

Dower does not lie *de tenemento*, being too indefinite. Ld. Raym. 1384.

If the demandant is not named, as *que fuit uxor B.* in the first part of the writ, it is bad; though, afterwards, the lands demanded are called *terras B. quondam viri sui*. Cro. Jac. 217.

How parties named therein.

The tenant, after appearing to the *grand cape*, returnable the third return of term, obtained a rule, on motion, to shew cause why he should not have an imparlance, which, at hearing, was discharged. *Et per cur.*—In dower *unde nil habet*, or any other real action, an imparlance is not to be given: *essoigns* are a sufficient delay. Real actions are not within any of the rules of court concerning imparlances. Barnes, 2.

(C) Of Demanding a View in Dower.

(C)

When the demandant has counted, the tenant may demand a view of the lands demanded. Co. Ent. 177. a.

Or if dower is demanded of a rent, he may demand view of the land out of which it issues.

By statute Westm. 2. 13 Edw. 1. c. 48. the tenant shall not have a view, if the husband of the demandant aliened to the tenant himself. 2 Inst. 481. 3 Lev. 169.; or if the husband died seised; or if a prior writ of the demandant abated by a plea, which arose upon the view. And if the tenant demands a view when it is not allowable, the demandant

Who entitled to such view.

ant may counterplead; as if the demandant's husband died seised. Clift. 299. Raft. 231. 3 Lev. 168.

The counter plea in such case, prays, that the view may be excluded. *Vide* more of the view in *Dower*, and what pleas may be had after. Com. Dig. 5 vol. 251. (and tit. *Abatement*, l. 25.)

(D)

(D) Of Pleading in Dower.

Of the pleas in
abatement.

There are some pleas which may be pleaded in abatement, as *ancient demesne*. That the defendant took husband pending the writ; that her husband was attaint; *non tenure*; or *non tenure* of part; that he holds jointly with A. not named.

As to pleas in bar, there are some which admit the demand, others which deny it.

In bar.

Of the first fort are the pleas of *tout temps prist*; and if this is pleaded on the first day of the return of the summons, it will excuse damage. Co. Lit. 32. b.

So the heir may plead detainment of *charters* and *tout temps prist* fi, &c. Raft. 224. b.; or detainment of *charters* as to parcel. Salk. 100.

Those pleas which deny the right, are *ne unques seise qui dower*; that demandant was under age dowable; that the husband of demandant is alive; an elopement by demandant during coverture; or a divorce *à vinculo matrimonii*; or that demandant had a jointure; or that the husband, or husband and wife, levied a fine, and demandant made no claim within *five years*; or that the husband suffered a recovery; or tenant may plead that lands were assigned for dower by the heir, &c.; that there was a demise for years before coverture, rendering rent, and pray, that demandant may be endowed of the reversion and rent; or that demandant has released her dower to the tenant of the freehold; or *ne unques accouple* in lawful matrimony: upon which plea, a writ goes to the bishop for his certificate of the marriage, and it is tried by the certificate.

Of the plea of
ne unques
accouple.

But if the marriage took place in a country where no bishop has a jurisdiction as ordinary, (as in case of a marriage in Scotland,) there the trial cannot be by the certificate of the bishop, but the fact may be tried by a jury, upon an issue joined between the parties: otherwise there would be a failure of justice. *Ilderton v. Ilderton*, 2 H. Blac. 159.

For pleas, and the replication to pleas, *vide* Com. Dig. Bac. Abr. &c.

An

An issue was joined upon *ne unques accouple*, &c. and a writ awarded to the bishop; he returned the evidence before him to prove the marriage, which appeared sufficient, but did not positively return that the parties were lawfully married. Plaintiff moved for judgment upon the return, but the court refused it, allowing plaintiff to move again: giving notice of the motion, that the other side might have an opportunity of disputing the sufficiency of the return. The return was afterwards amended, and the fact certified instead of the evidence, and plaintiff had judgment. Barnes, 1.

On the plea of *ne unques accouple*, and the issue thereupon, a writ was awarded to the bishop; who certified that she was accoupled *in vero matrimonio cum predict. B. sed clandestino et quod B. & E. (demandant) tori et mensa participatione mutuo cohabitaverunt usque ad mortem predict. B.*, and judgment was thereupon given for the demandant. On which, error was brought, and *inter alia* it was assigned, that there was neither day nor place of the marriage mentioned in the certificate; but the court held it not material or issuable, because the certificate from the bishop is conclusive. That the certificate is not good, because it did not answer to the words of the issue, "*Ne unques accouple in loyal matrimonio*," for that it was a true matrimony, and that they lived together at bed and board, is but argumentative that they were *legitimo matrimonio copulati*; but the court disallowed the exception also: for *vero matrimonio*, though *clandestino copulati fuerunt*, is as good as *legitimo matrimonio*; and have all one intendment; and though it be *clandestino*, yet it doth not vitiate the marriage (a): and when it is added, that *tori et mensa participatione cohabitaverunt*, &c. this proves they continued as husband and wife during his life, and therefore it is not to be questioned now. Judgment affirmed. Cro. Jac. 351. Brook, 54. Dyer, 313. Co. Lit. 33. 9 Co. 19.

The plea of *ne unques accouple in loyal matrimonio*, which is the only plea whereby the lawfulness of a marriage can be put in issue, is only to be pleaded in a *real action*. Therefore the certificate of the ordinary is not at this day necessary in any personal or mixed action. Salk. 437. 1 Lev. 41.

(E) Of Judgment in Dower.

(E)

1. Of Judgment by Default.

If the tenant appears and makes default in the same term, there shall be final judgment against him. 2 Saund. 46.

If default be of same term.

(a) Vide the Marriage Act, 26 Geo. 2. c. 33. since this case.

Or

Or if he confesses the action, or *nil dicit*, or *non sum in-formatus*, there shall be judgment thereon.

If in another term.

But if the tenant makes default in another term, a *petit cape* shall issue. 2 Saund. 46. And if he cannot save his default upon the *petit cape*, there shall be final judgment against him.

So if the tenant pleads that the husband is alive, and the demandant, at the day for trial, is ready with her proofs, there shall be final judgment against the tenant if he makes default. 2 Inst. 80.

Of the petit cape.

If the demandant is not present with her proofs, there shall be a *petit cape* awarded.

So if the tenant makes default at the trial by jury, there shall be a *petit cape* against him; and if he does not save his default, there shall be final judgment against him.

So there shall be judgment by default, though the tenant is an infant. Cro. Jac. 111.

How if infant be tenant.

In dower against an infant, he made default upon the *grand cape* returned: and it was held *per tot. cur.* that judgment shall be given upon the default; for the infant shall not have his age in dower, which being but for life, demandant may be totally defeated by his frequent defaults; though some of the books say, that if judgment be given upon the *grand cape* before appearance, this is error; *secus*, if he appears by guardian, and after loseth by default; for then, if any default be in the guardian, he shall recover against him in a writ of *disceit*; but other books doubt if the infant shall not have his age in dower: however, the other seems the more reasonable opinion. Cro. Jac. 111. 392, &c. Moor, 1148, &c.

Of the operation of the petit cape, and what shall be error in the proceeding.

On error to reverse a judgment in dower, at the grand sessions in Wales, it appeared by the record, that the tenant appeared at the return of the summons, and day was given over; and then came by attorney, and said nothing in bar. Whereupon it was considered, that the third part of the lands aforesaid should be taken into the hands of our lord the king; and upon day given *ad aud. judicium*, judgment was given, that the demandant do recover. The error assigned was, that they ought not to have awarded a *petit cape*, because, as defendant appeared, they ought to have given judgment on the *nil dicit*; for the *petit cape* is always upon default after appearance, and is only to answer the default, as the *grand cape* is before appearance, to answer the default and demand. But this was held to be no error, being only an awarding of more process than was necessary, and it was of advantage to the tenant by delaying the demandant. And, *per* Twysden, if erroneous, they might now give judgment upon the

the *nil dicti* in this court. Vent. 60. 2 Saund. 46. 50. 5 Keb. 450, &c.

In dower, the tenant at the day of taking the inquest, after the jury had appeared, and before they were sworn, made default, and a *petit cape* was awarded; and the tenant at the day in *banco* informed the court, that he was but tenant for life, and the reversion in one A., who at the day in *banco* ought to be received; and the court appointed him to plead his plea at the return of the *petit cape*, before which time his appearance seems idle. Brownl. 126.

The demandant upon judgment by default, after a *grand cape*, shall have no damages upon the inquisition found, if there was no notice of executing the *writ of inquiry*. 3 Lev. 409.

2. Of final Judgment, Writ of Inquiry, Seisin, &c.

The final judgment in dower is, *quod quærens recuperet seisinam de tertia parte tenementor. petit.*; or if it be of gavel-kind lands, *quod recuperet seisinam de dimidio, &c.* Final judgment, what.

And by the stat. of Merton, 20 Hen. 3. c. 1. *Si recuperaverit tenementa de quibus vir obiit seistus, tenens reddat damna, viz. valorem dotis tempore mortis viri usque ad diem, quo per judicium curiæ, seisinam suam recuperaverit.*

And therefore after judgment for seisin, and *habere facias seisinam* awarded, if the demandant makes a suggestion upon the roll, that her husband died seised, there shall be a writ to inquire what damages. 1 Lev. 38. Clift. 302. Of the damages and writ of inquiry.

And upon return of the inquisition, there shall be judgment *quod recuperet valorem*, and her damages. Or the jury who try the issue may also inquire of the *value and damages*. Or the demandant may remit the *value and damages*, and have an *habere seisinam* immediately. Town, J. 100.

Though the statute says only, that she shall recover damages to the time of the judgment; yet if she obtain judgment by *default*, upon a writ of inquiry, the jury may give her damages to the time of the inquisition, unless she were in possession before by virtue of an execution awarded upon the judgment by default. The jury may assess damages beyond the revenue, for she may have sustained more. 1 Leon. 56.

Damages in dower, by the statute of Merton, extends only to lands whereof the husband died seised; and therefore, if the jury do not find that he died seised, judgment for damages will be reversed. They must find too, of what estate he died seised, viz. an estate *in fee*, or *in tail*; for if the husband alien, and take back an estate for life, the wife shall recover dower, but no damages.

If the jury find the husband died seised, they must find the time when, the annual value of the land, and damages on account of the detention and costs; but if they find the husband was seised, but did not die so, then no costs or damages, but only the value of the land: for damages are only given by the statute of Merton, where he died seised; and the statute of Gloucester gives costs only where the plaintiff recovers damages. 2 Saund. 33.

The reason why the jury are to find the value of the land in case the husband died seised, is, that the court may give damages pursuant to the statute of Merton, from the death of the husband, to the time of the judgment. And if the heir fell to J. S., and the widow recovers her dower against him, he must pay the whole *mesne profits*, from the death of the husband, though he have not himself been half the time in possession. She is entitled by the statute, and can recover only against the tenant. *Brown & Ux. v. Smith*, Hil. 25 & 26 Car. 2. C. B.

Damages to be only after demand.

Damages must be after demand of dower; for the heir is not bound to assign till demanded. But unless the heir plead *tout temps prist*, he shall not take advantage of the widow's laches in not demanding; and though he pleads *tout temps prist*, yet she shall recover damages from the *teste* of the original, to the execution of the writ of inquiry; but if the heir assign dower, and widow accepts thereof, she loses her damages. Co. Lit. 32. *Kent and Kent*, Mich. 1733. B. R. *Yeo and Yeo*, 14 Geo. 2. B. R.

How damages lost.

Demand of infant good.

Upon a trial at bar, the issue was, if there was a demand of dower to entitle plaintiff to damages; she proved an actual demand of the heir, who was an infant; and the court held that dower was demandable of the heir, though under fourteen; and that the not assigning of dower, though the infant did not refuse to do it, but was prevented by his guardian, was a refusal in law sufficient to entitle plaintiff to damages. *Corfellis v. Corfellis*, Hil. 29 & 30 Car. 2. C. B.

From what time to what time damages to be given.

On execution of a writ of inquiry of damages, the jury found for damages the value of a *third* of the land, from the time of the husband's death, till the day of the inquisition, without any deduction for *reprises*, (viz. land-tax, repairs, and chief rent,) and for costs, the jury gave the amount of the attorney's bill for a demandant, upon his evidence that it was a reasonable bill, and that he expected it from his client. The court thought that the value of the *third* of the profits run since the death of the husband, should have been computed only to the time of awarding the writ of inquiry, and not to the day of the inquisition; that an allowance ought

ought to have been made for *reprizes*; the words of the writ are (*ultra reprisas*); and that the attorney's bill to his client was the measure of costs. The inquisition was set aside, and a new writ ordered to be executed before a judge at the next assizes, on payment of costs. Barnes, 234. *Qu.* If the jury ought not to have given common costs as *one shilling*, and the rest allowed as costs *de incremento* by the prothonotary? But it has been said, that if the jury give damages *à morte-viri*, to the time of the inquisition, though it is after the judgment, it will be good. R. Leon. 56.

So, though they give damages beyond the value of the land.

Value or damages are only recoverable in dower, *unde nil habet*. Co. Lit. 22. b.

The writs of *seisin* and *inquiry of damages* are blended in one writ.

If dower is demanded of *lands*, or of things that may be severed, the sheriff ought to assign her the *third part* by metes and bounds: and if the sheriff does not return *seisin* by *metes and bounds*, it is ill, unless closes certain are assigned by name, or such a manor which is known and certain, in lieu of dower of other manors. Perk. 414. Roll. Abr. 682. Co. Lit. 34. Bendl. 87. But an assignment, though in a different manner by consent of the parties, may be good. Cro. Eliz. 310. Roll. Abr. 683.

Of the assignment by sheriff on writ of *habere facias seisinam*.

If a woman be dowable in three manors, and accepts of the heir one of those manors, in lieu of dower in all the rest, this is good, though against common right, which gives her but the third part of each manor. Roll. Abr. 683.

But to a writ of *habere facias seisinam*, the sheriff cannot return that he delivered the demandant one, instead of a *third part* of the three, in recompence of her dower.

Upon the recovery of dower, and *seisin* awarded, the sheriff returned that he had assigned to the demandant her dower of a house, the *third part* of each chamber, and had chalked it out to her. And this return was held an idle and malicious return, and he was committed for it, as in such case he ought to have assigned her certain chambers, or rooms thereof. Palm. 265.

The sheriff was committed, for refusing to make an equal allotment of dower, and taking 60*l.* of demandant to execute the writ, and the court ordered an information against him for it. 1 Keb. 743.

If dower is demanded of meadow, pasture, &c. the sheriff may assign all meadow, &c. for dower. R. Mod. 12. 19.

A woman recovered dower, had a writ to the sheriff, who returned that he had delivered 84 acres to the demandant of

the land mentioned in the writ. After a *sci. fa.* was brought, suggesting that 60 acres of the 84 assigned to her by the sheriff were a stranger's, not mentioned in the record, and therefore she ought to have a new division. The tenant said, that the other 24 acres were parcel of the land recovered, and that she had entered and accepted the 24 acres; and upon demurrer it was adjudged, that she was barred by the acceptance and entry into the 24 acres. Moor, pl. 167. 928. Dy. 91. *in margine*.

Dower was brought *de tertia parte* of a mill, kiln-house, &c. and judgment was to recover the *third part in separatitate per metas & bundas*. And this judgment was reversed upon error, for it ought to have been of the third part generally; for if *per metas & bundas*, none can make use of it. Lev. 181. 2 Keb. 8.

How if demandant or tenant die during proceedings,

If demandant dies before writ of inquiry executed, her administrator cannot bring a *sci. fa.* for the damages and *mesne profits*. Salk. 252.

So, if tenant dies after judgment and writ of *seisin* executed, the demandant cannot bring a *sci. fa.* for inquiry of damages, after the death of the tenant, against his heir or tertenants. 3 Lev. 275. 1 Sid. 188.

or if error be brought.

By 16 & 17 Car. 2. c. 8. execution shall not be stayed by writ of error, upon any judgment after *verdict*, unless plaintiff become bound to pay damages and costs in case of affirmance, or plaintiff discontinue to be nonsuit; and a writ shall issue to inquire of *mesne profits*, and damages by waste done after the first judgment. Stra. 971.

Judgment in dower shall not be stayed by error, if plaintiff in error doth not enter into recognizances to pay damages and costs. Carth. 134.

If judgment be affirmed in *dom. proc.* and costs given, the demandant may bring an action on the recognizance for such costs, without suing out a writ of inquiry. And. 153.

SECTION II.

Partition.

- (A) Of the Intent and Operation of Statute 8 & 9 W. 3. c. 31.
- (B) Of the Process by Writ of Partition.
- (C) Of the Declaration in Partition.

(D) Of

(D) Of the Pleadings in Partition.

(E) Of the first Judgment in Partition; And herein, of the Writ *de Partitione faciendâ*, &c.

(F) Of the second or final Judgment in Partition.

(A) Of the Intent and Operation of the Statute 8 & 9 W. 3.

(A)

By the common law, *joint-tenants* might agree to make partition of the lands, but one of them could not *compel* the others so to do; for as such estate is originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. Whereas by the common law, *coparceners* were compellable to make partition, if any one of them chose to sue out a writ of partition. But now by the statutes 31 Hen. 8. c. 1. and 32 Hen. 8. c. 32. *joint-tenants*, and *tenants in common*, as well as *coparceners*, are compellable by writ of partition to divide their lands; and the statute of 8 & 9 W. 3. has only provided an easier method of carrying on the proceedings by the writ of partition, than was used at the common law.

Of the intent and operation of the statute 8 & 9 W. 3.

By the statute 8 & 9 W. 3. c. 31. which is intituled, "An act for the easier obtaining partition of lands in coparcenary, joint-tenancy, and tenancy in common;" after reciting, that "Whereas the proceedings upon writs of partition between coparceners by the common law or custom, joint-tenants, and tenants in common, are found by experience to be tedious, chargeable, and oftentimes ineffectual, by reason of the difficulty of discovering the persons and estates of the tenants of the manors, messuages, lands, tenements, and hereditaments, to be divided, and the defective or dilatory executing and returning of the process of summons, attachment, and distress, and other impediments in making and establishing of partitions, by reason of which divers persons having undivided parts, or parts, are greatly oppressed and prejudiced, and the premises are frequently wasted and destroyed, or lie uncultivated and unmanured, so that the profits of the same are totally, or in a great measure lost; for remedy whereof, it is enacted, That after process of *pone*, or attachment returned upon a writ of partition, affidavit being made by any credible person of due notice given of the said writ of partition to the tenant or tenants to the action, and a copy thereof left with the occupier, or tenant or tenants; or,

New proceedings under the statute.

Of the affidavit
of notice of
writ of part-
ition.

Of the time of
appearance,

Proceedings in
default thereof.

Of examining
demandant's
title;

and executing
writ accord-
ingly.

“ if they cannot be found, to the wife, son, or daughter (be-
“ ing of the age of one-and-twenty years or upwards) of the
“ tenant or tenants, or to the tenant in actual possession, by
“ virtue of any estate of freehold, or for term of years, or
“ uncertain interest, or at will, of the manors, lands, tene-
“ ments, or hereditaments, whereof the partition is de-
“ manded (unless the said tenant in actual possession be de-
“ manded in the action) at least forty days before the day
“ of the return of the said *pone* or attachment; if the tenant
“ or tenants to such writ, or any of them, or the true tenant
“ of the messuages, lands, tenements, and hereditaments as
“ aforesaid, shall not, in such case, *within fifteen days after*
“ *return of such writ of pone or attachment*, cause an appear-
“ ance to be entered in such court where such writ of *pone*
“ or attachment shall be returnable; then, in default of
“ such appearance, the demandant having entered his de-
“ claration, the court may proceed to examine the demand-
“ ant's title, and quantity of his part and purpart; and ac-
“ cordingly as they shall find his right, part, and purpart to
“ be, they shall for so much give judgment by default, and
“ award a writ to make partition, whereby such proportion,
“ part, and purpart may be set out severally: which writ
“ being executed *after eight days notice to the occupier, or tenant,*
“ *or tenants of the premises*, and returned, and thereupon final
“ judgment entered, the same shall be good, and conclude
“ all persons whatsoever, after notice as aforesaid, whatever
“ right or title they have, or may at any time claim to have,
“ in any of the manors, &c. mentioned in the said judg-
“ ment and writ of partition, although all persons concerned
“ are not named in any of the proceedings, nor the title of
“ the tenants truly set forth.”

By *sect. 2.* Provided, that if such tenant or other shall in one year after judgment entered, or in case of infancy, coverture, nonfancy, or absence, within a year after such inability determined, shew a good matter in bar of such partition, &c. the court may set aside such judgment; but if the same is confirmed, the party appealing pays costs.

By *sect. 3.* No plea in *abatement* shall be admitted or received in any suit of partition, nor shall the same be abated by reason of the death of any tenant.

By *sect. 4.* If the *high sheriff* cannot be present at the execution of the judgment in partition, the under-sheriff, in the presence of two justices, may proceed therein. And in case such partition be made, returned, and filed, the tenants, before division, are to remain tenants, under the same conditions, and the landlords, &c. are to make good to their tenants the said parts as before partition made.

By *stat.* 5. The sheriffs, under-sheriffs, &c. are to give due attendance to the execution of the writ of partition, and in case the demandant does not pay the fees to the sheriff, &c. then the court shall award them, &c.

The above act was made perpetual by the 3 & 4 Ann. c. 18. sec. 2.

(B) Of the Writ of Partition, &c.

(B)

Since the above statute, *partition* has been usually made by writ: before which statute it was done either by writ, commission, or consent, and was in many cases liable to be defeated. Writ how sued out.

By the statute 31 Hen. 8. c. 1. *joint-tenants*, and *tenants in common*, or in right of their wives, are compellable by writ to make partition.

To proceed to make *partition*, according to this statute, the demandant or demandants apply to the court of Chancery, and sue out an *original writ*, which is to this effect;

"GEORGE the Third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth.—To the sheriff of Form thereof.
greeting: If
A. B. and C. D. shall give you security, that their suit shall be prosecuted; then summon, by good summoners, E. F., that he be before our justices at Westminster, on the Morrow of All Souls, to shew wherefore, whereas the said A. B., C. D., and E. F. hold together and undivided the manor of with the appurtenances, and fourteen
messuages, twelve cottages, sixteen barns, three dove-houses, four stables, thirteen gardens, two hundred acres of land, two hundred acres of meadow, two hundred acres of pasture, two hundred acres of wood, one hundred acres of furze and heath, two hundred acres of moor, one hundred acres of bushy ground, one hundred acres of marsh, one hundred acres of broom, twenty acres of land covered with water, twenty pounds rent; common of pasture for all manner of cattle, court-leet, courts baron, view of frank-pledge, profits and perquisites of court, free warren, free chase, free fishery, goods and chattels of felons, fugitives, outlaws, and those which are put in exigent, deodands, chattels waived and estrayed, with the appurtenances, in the parishes of and of
which the said E. F. denieth partition to be made between them according to the form of the statute made and provided (a), and unjustly permitteth not the same to be done, and contrary to the form of the said statute, as they

(a) Or, "according to the custom of England," if parceners by custom.

“ say; and have you there the summoners, and this writ.
“ Witness ourself at Westminster, the day of
“ in the nineteenth year of our reign.

**Summons
thereon.**

Upon this writ the sheriff should summon the tenants, and upon the return thereof, *affidavit* of the service of such writ should be made according to the statute, to this effect :

" Between { A. B. and C. D. demandants,
and E. F. tenant.

**Affidavit ac-
cording to
statute.**

" I. M. and O. P. of _____ officers to the sheriff of
 " _____ severally make oath, and say, that they the said
 " deponents did, on the _____ day of _____ in the year of
 " our Lord 1795, serve the above-named E. F. tenant, with
 " the writ of partition in this cause, by delivering to and
 " leaving with the said E. F. a copy of the said writ, and
 " acquainting him with the contents thereof; and these de-
 " ponents did, on the said _____ day of _____ in the
 " said year of our Lord 1795, deliver to and leave with
 " P. Q., R. S., T. V., &c. the occupiers of the messuages,
 " lands, and tenements, in the said writ mentioned, a true
 " copy of the same writ.
 " Sworn," &c.

Of the pone on
default of ap-
pearance.

Upon default of appearance in court, the *demandants* should sue out a *pone* or attachment, which is to this effect :

“ *GEORGE the Third, &c.—To the sheriff of greet-*
 “ *ing: Put by sureties and safe pledges E. F. of*
 “ *that he be before the justices at Westminster in eight days*
 “ *of St. Hilary, to answer A. B. and C. D. wherefore the*
 “ *said A. B. C. D. and E. F. hold together and undivided*
 “ *the manor of with the appurtenances, &c.* [as in
 “ *the writ], of which the said E. F. denieth partition to be*
 “ *made between them, according to the form of the statute in*
 “ *such case made and provided, and unjustly permitteth not the*
 “ *same to be done; and to shew wherefore he was not in*
 “ *our court before our justices at Westminster, on the*
 “ *Morrow of All Souls last past, as he was summoned; and*
 “ *have there the names of the pledges and this writ.*
 “ *Witness,*” &c.

How served.

This writ should be served in the same manner as the writ of partition was, and the parties should be informed of the contents.

How tested.

The *pone* should bear teste on the *quarto die post* of the return-day of the *writ of partition*, and there must be fifteen days between the teste and return of it at least; and by the statute of 8 & 9 W. 3. *ante*, there must be at least *forty days*

Time of service.

between the service of the writ of partition and the return of the pone or attachment.

(C) Of the Appearance and Declaration.

(C)

If the tenant does not within *fifteen days* after the return of the pone or attachment cause an appearance to be entered, the demandant may enter his declaration, and the court will proceed to examine his title; and if they find the right with the demandant, there shall be judgment by default for so much, and a writ awarded to the sheriff to make partition.

Appearance when to be entered.

Or if the defendant appears, the plaintiff must declare. The declaration is in the following form:

Of the declaration.

" ——— to wit, E. F. of ——— in the county afore-
 " said, was summoned to answer A. B. and C. D. of a plea,
 " wherefore, whereas the said A. B., C. D., and the said E. F.
 " hold together and undivided the manor of ——— with
 " the appurtenances, &c. [specify the premises according to
 " the writ], of which the said E. F. denieth partition to be
 " made between them according to the form of the statute
 " in such case made and provided, and unjustly permitteth not
 " the same to be done, and contrary to the form of the
 " statute: And whereupon the said A. B. and C. D. by
 " their attorney, say, that whereas they and the said
 " E. F. hold together and undivided the tenements aforesaid,
 " with the appurtenances, whereof it belongs to the said
 " A. B. and C. D. and their heirs, to have *one moiety* of the
 " tenements aforesaid, with the appurtenances, to hold them
 " in severalty, so that the said A. B. and C. D. of their
 " moiety belonging to them of the tenements aforesaid, with
 " the appurtenances; and the said E. F. of his moiety be-
 " longing to him of the tenements aforesaid, with the appur-
 " tenances; may severally apportion themselves: he the said
 " E. F. denieth partition thereof to be made between them
 " according to the form of the statute in such case made and
 " provided, and unjustly permitteth not the same to be
 " done, and contrary to the form of the said statute; where-
 " upon they say, that they are injured, and have damage to
 " the value of one hundred pounds. And therefore they
 " bring suit," &c.

Form thereof.

The declaration by one *parcener* or *joint-tenant* against the others, must shew how they are joint-tenants. Cro. El. 64.

What it must shew.

But not where they are *tenants in common*, for they claim by several titles, and one is not consuant of the other's title. R. Cro. El. 64.

So,

So, if they are parceners, a declaration which shews that it was the inheritance of the common ancestor in *tail*, is sufficient, without shewing how the estate-tail is commenced. Dy. 79. b.

But if the declaration says that the plaintiff and defendant were seised in fee, where it is found that the defendant has only in tail, the writ abates. R. Cro. El. 760.

(D)

No plea in abatement.

(D) Of pleading in Partition.

To the declaration there can be no plea in *abatement*, since the stat. 8 & 9 W. 3. c. 31. s. 3. Nor shall the writ abate by the death of defendant. *Ibid.*

What pleadable in bar.

And if he pleads in *bar*, he can plead no other plea than *non tenent insimul*, for every other plea in bar is *tantamount* to *non tenent insimul*.

Upon which plea issue may be taken, and the parties proceed to trial as in other cases.

Of confessing the action.

But the party may confess the action, and consent that partition may be made.

Of the damages.

In a writ of partition no *damages* shall be recovered, nor an inquiry of them, Noy, 68. 143.; for it is a real action.

Of examining the title of demandant according to stat.

Process having been duly returned, declaration entered, and no appearance entered by the tenant *within fifteen days*, pursuant to the statute 8 & 9 W. 3. the court on motion granted a rule to shew cause, which was afterwards made absolute, for the court to proceed to examine the title of the demandant, according to the statute. On the morrow the title was examined, and no counsel appearing for the tenant, judgment on default was given for the demandant to hold in severalty the premises demanded in his count, in some of which he was seised of two undivided third parts; and in others of a moiety only with the *tenant*, the earl of Thanet. And a writ of partition was awarded accordingly. Upon the return of the writ, the sheriff returned that he had executed the same in the presence of persons who attended for plaintiff and defendant respectively; and he specified in his return the several parcels, with their metes and boundaries; and then plaintiff moved for final judgment, *quod partitio sit stabilis*. And afterwards the writ was made absolute, on affidavit of notice to the defendant and tenants in possession. *Halton v. Earl of Thanet*, 2 Black. Rep. 1134. 1159.

(E)

(E) Of the first Judgment in Partition, and of the Writ *de Partitione faciendâ*.

Two judgments in partition.

In *partition* there are two judgments; the first *quod partitio fiat*; the second *quod partitio firma & stabilis in perpetuum teneatur*.

After

After confession of the action or issue tried for the plaintiff, there shall be judgment *quod partitio fiat*. Co. Lit. 167. b.

What.

And thereon a writ shall issue to the sheriff to make partition.

The first judgment *quod partitio fiat* is in the following form:

" Therefore it is considered, that partition be made thereof between them, &c. And it is commanded to the sheriff, that in his proper person he go to the manor and tenements aforesaid, and in the presence of the parties aforesaid, being forewarned, if they shall be willing, the manor and tenements aforesaid, with the appurtenances, by the oath of good and lawful men of his county, respect being had to the true value of the manors and tenements aforesaid, with the appurtenances, he cause to be divided into two equal parts, (or as the case is,) and one part of those parts he cause to be delivered and assigned to the said A. B. and C. D. and the other part thereof to the said E. F. to be holden to them and their heirs in severalty, so that neither the said A. B. and C. D. nor the said E. F. may have more of the manor and tenements aforesaid, with the appurtenances, than it belongeth to them to have; and that the said A. B. and C. D. of their part to them thereof belonging, and the said E. F. of his part to him thereof belonging, may severally apportion themselves; and that that portion, by the said sheriff so distinctly and openly made, he have here from the day of Easter in fifteen days, under his seal and the seals of those," &c.

Form of the first judgment.

Error does not lie on the judgment *quod partitio fiat*, nor is the record removed by it; because the writ of error comes too soon, and error does not lie till the final judgment *quod partitio firma & stabilis*, &c. 3 Salk. 145.

No error lies thereon.

Upon the foregoing judgment, the demandant shall have a writ *de partitione faciendâ*, which is to the following effect:

" GEORGE the Third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth.—To the sheriff of greeting: Whereas E. F. late of in your county, esquire, was summoned to be in our court, before our justices at Westminster, to answer A. B. and C. D. of a plea, wherefore the said A. B. and C. D. and the said E. F. hold together

Form of writ de partitione faciendâ.

" and

" and undivided the manor of with the appurtenances
 " [Specify the premises according to the declaration], and
 " the said E. F. denied partition thereof to be made be-
 " tween them, according to *the form of the statute in such case*
 " *made and provided*, and unjustly permitted not the same to
 " be done, and contrary to the form of the statute, as they
 " said; and the said E. F. *appearing in our said court, freely*
 " *consented that partition thereof might be made* (a): Whereupon
 " it was considered in our same court, before our justices at
 " Westminster, that partition should be made between them
 " of the manor and tenements aforesaid, with the appurte-
 " nances. Therefore we command you, that taking with
 " you twelve free and lawful men of the neighbourhood
 " of aforesaid, by whom the truth of the matters
 " may be better known, in your proper person you go to
 " the manor and tenements aforesaid, with the appurte-
 " nances; and there, in the presence of the parties aforesaid,
 " by you to be forewarned, if they shall be willing to
 " be present, the same manor and tenements with the ap-
 " purtenances, by the oath of the said twelve free and law-
 " ful men, respect being had to the true value of the manor
 " and tenements aforesaid, with the appurtenances, you
 " cause to be divided into *two equal parts*, and one part of
 " those parts to be delivered and assigned to the said A. B. and
 " C. D. and the other part thereof to the said E. F. to be
 " holden to them and their heirs in severalty, so that neither
 " the said A. B. and C. D. and the said E. F. may have
 " more of the manor and tenements aforesaid, with the ap-
 " purtenances, than it belongs to them to have: and that
 " the said A. B. and C. D. of their part to them thereof
 " belonging, may severally apportion themselves: and that
 " that partition by you so distinctly and openly made, you
 " have here from the day of Easter in fifteen days, under
 " your seal and the seals of those by whose oath you shall
 " have made that partition; and have you there the names
 " of those by whose oath you shall have made the same par-
 " tition, and this writ. Witness Sir William de Grey,
 " knight, at Westminster, the day of in the
 " thirty-sixth year of our reign," &c.

Proceeding
 thereon by the
 sheriff.

Upon this writ, the sheriff ought to give notice to the parties of executing the same, and he ought to attend in person. But by the stat. of Wil. 3. *ante*, the under-sheriff, or one

(a) If there was judgment by default, and the plaintiff declared and proceeded according to the statute, it should so be stated in this writ.—So if defendant pleaded *non tenent infirmal*, and there was a verdict against him.

who

who officiates as under-sheriff, may execute the same in the presence of two justices.

If the manor to be divided lies intermixed with other lands, so that the jury do not know the limits, quantity, &c. of the tenements to be divided, and the owner of the intermixed lands, &c. will not shew the certainty of his lands, yet the jury ought to make partition as well as they can.

Dy. 266. a.

After the partition made, it must be returned to the court under the seals of the sheriff and the twelve jurors. Lit. sect. 249. How returned.

The Return of the above Writ.

“ At which day here comes as well the said A. B. and Form of return.
 “ C. D. as the said E. F. by their attornies aforesaid. And
 “ the sheriff, namely, John Thomas esquire, now here re-
 “ turns a certain partition between the parties aforesaid, of
 “ the tenements aforesaid, by the said sheriff, by virtue of
 “ the aforesaid writ, and according to the form thereof, by the
 “ oath of twelve free and lawful men of the neighbourhood
 “ of aforesaid made: which follows in these words,
 “ to wit, to wit, I, John Thomas esq. sheriff of the
 “ county aforesaid, humbly certify and return to his majesty’s
 “ justices, at the day and place in the writ hereunto annexed
 “ mentioned, that by virtue of the said writ to me directed,
 “ on the day of in the twentieth year of the
 “ reign of George the Third, of Great Britain, France, and
 “ Ireland, king, defender of the faith, and so forth, and in
 “ the year of our Lord 1780, having taken with me O. P.,
 “ Q. R., S. T., &c. twelve free and lawful men of my baili-
 “ wick, and of the neighbourhood in the said writ men-
 “ tioned, by whom the truth of the matter may the better
 “ be known, in my proper person did go to the manor and
 “ tenements in the said writ specified; and there, by the
 “ oath of the said jurors, in the presence of the parties
 “ in the said writ named, by me forewarned according to
 “ the command of the said writ, and by their assent, the said
 “ manor and tenements, with their appurtenances (respect
 “ being had to the true value of the same), I did cause to be
 “ divided into two equal parts, and one part thereof, that is
 “ to say, all those *two messuages, two barns, and the land*
 “ *thereto belonging, called the containing two hundred*
 “ *and twenty acres, two roods, and seven perches, more or less,*
 “ *late in the occupation of William Jones, and now of Michael*
 “ *Dixon and his assigns, and all that messuage, &c.* [specify-
 “ ing in like manner the whole apportionment allotted to
 “ the demandants]; and all commons, common of pasture,
 “ woods,

“ woods, under-woods, and trees, ways, waters, easements
 “ and appurtenances to the said several messuages, cottages,
 “ farms, lands, wood, ground, and premises belonging or
 “ appertaining, or therewith used and enjoyed; all which
 “ said premises are situate, lying, and being in in my
 “ said county; and did cause to be delivered and assigned to
 “ the said A. B. and C. D. in the said writ named; and the
 “ other part thereof, that is to say, all the manor of
 “ in the said county of with the court-baron of the
 “ same; and all rights, royalties, members, and appurte-
 “ nances thereof; and all that barn, farm, and lands, &c.
 “ &c. [specifying the whole apportionment allotted to the
 “ defendant]. All which said messuages, cottages, farms,
 “ barns, lands, woods, grounds, and premises are situate,
 “ lying, and being in the parish of in my county, I did
 “ cause to be delivered and assigned to the said E. F. esq. in
 “ the said writ named, to be holden to them and their heirs
 “ in fealty, as by the said writ I am commanded; so
 “ that neither the said A. B. and C. D. nor the said E. F.
 “ might have more of the manor and tenements aforesaid,
 “ with the appurtenances, than it belonged to them to have;
 “ and that the said A. B. and C. D. of their part to them
 “ thereof belonging, and the said E. F. of his part to him
 “ thereof belonging, may severally apportion themselves.
 “ In witness whereof, as well I the said sheriff, as the
 “ jurors aforesaid, to this indented partition, have set our
 “ seals the day and year and place above mentioned.
 “ John Thomas esq. sheriff.”

(F)

(F) Of the final Judgment in Partition.

Form of final judgment.

Upon the foregoing return to the writ *de partitione faciendâ*, the final judgment of the court is, “ Therefore it is considered, that the aforesaid partition be holden firm and “ effectual for ever,” &c. And therefore this judgment, when made by writ after the appearance of the party, shall not be defeated, Co. Lit. 168. b. 171. a.; even though made against a *feme covert*, *ibid.*; or though not equal, *ibid.*; or though not equal, and any one of the parties be an infant. *Ibid.*

Effect thereof.

And so by the statute 8 & 9 W. 3. c. 31. If made without the appearance of the tenant, if he does not appear within fifteen days after the return of the attachment, where an affidavit was made of notice to the tenant *forty days* before the return of the writ, and a copy of it left with the occupier of the land.

But by the same statute, if judgment be in a writ of partition, without the appearance of the defendant, upon motion

tion shewing a probable bar, or that the demandant hath not title to so much, within a year after judgment, or (if the party was an infant, covert, nonsane, or out of the realm after the inability is removed) the court may order the defendant to plead, &c.

Or if the demandant's title be admitted, but the partition appears unequal, the court may award a new partition.

SECTION III.

Of the Proceedings in Quare Impedit.

A *quare impedit* is a possessory action, and is now the only one used in case of the disturbance of patronage to a church or ecclesiastical benefice. The assize of *darrein presentment* which lies only for disturbance, where a man has an advowson by descent, from his ancestors having fallen into disuse, as the writ of *quare impedit* is equally remedial, whether a man claims title by *descent* or *purchase*. 3 Blac. Com. 246.

If the right of nomination be in one, and of presentation in another, and either impede the other in his right, a *quare impedit* lies. *The King v. Marquis of Stafford*, 3 D. & E. 646.

In treating of these proceedings we will consider—

(A) The Writ of *Quare Impedit*, and Appearance thereto.

(B) The Declaring in *Quare Impedit*.

(C) The Pleading in *Quare Impedit*.

(D) The Verdict, Inquiry, &c.

(E) The Judgment in *Quare Impedit*.

(A) Of the Writ of *Quare Impedit*, and Appearance thereto, &c. (A)

A *quare impedit* must be brought in the Common Pleas by Where brought
all except the king, who may bring it in B. R. or C. B.
F. N. B. 32. e.

In order to bring a *quare impedit*, the party applies to the *curfitor* for an *original writ* out of Chancery, which is to this effect:

“GEORGE the Third, by the grace of God, of Great Form of writ.
“Britain, France, and Ireland, king, defender of the faith,
“&c.

" &c.—To the sheriff of greeting : Command
 " Thomas bishop of and C. D. esq. that justly and
 " without delay they permit A. B. to present a fit person to
 " the church of in the said county, which is void,
 " and in the gift of the said A. as he saith, and whereof he
 " complaineth, that the said bishop and C. D. unjustly hin-
 " der him; and unless they shall so do, and the said A.
 " shall give you security that his suit shall be prosecuted,
 " then summon by good summoners the said bishop and
 " C. D. that they be before our justices at Westminster,
 " from (a), to shew wherefore they will not do it, and
 " have you there the summoners and this writ.
 " Witnefs ourself at Westminster, the day of
 " in the thirty-sixth year of our reign. "

The Sheriff's Warrant thereon.

Warrant there-
on.

" ——— to wit. John Williams, esq. sheriff of the
 " county aforesaid, to O., P., Q., R., &c. jointly and se-
 " verally, by virtue of his majesty's writ to me directed, I
 " command that you or some or one of you command Tho-
 " mas bishop of and C. D. esq. that justly and without
 " delay they permit A. B. to present a fit person to the
 " church of which is void, and in the gift of the
 " said A. as he saith, and whereof he complaineth that the
 " said bishop and C. D. unjustly hinder him; and unless
 " they shall so do, and the said A. shall give you security
 " that his suit shall be prosecuted, then summon by good
 " summoners the said bishop and C. D. that they be before
 " his majesty's justices at Westminster, from to
 " shew wherefore they will not do it; and that you return
 " the same to me, so that I may have there the summoners
 " this precept. Given, &c. at, &c. in, &c.

" By the same sheriff."

Of the sum-
mons.

By the stat. of Marlbridge, 52 Hen. 3. the sheriffs ought to make summons by good summoners, and return their names upon the original. 1 Brownl. 158.

And the summons ought to be served on the defendant, or at the church-door. *Ibid.* 2 Mod. 265.

Of the effoign.

The defendants may have the common *effoign*, or *de malo lecti*, 2 Inst. 124.; but no other *effoign*. 2 Inst. 125. 1 Brownl. 160.

And if the defendants *effoign*, the plaintiff ought to adjourn it for fifteen days, otherwise he shall be nonsuited. 1 Brownl. 159. Dal. 81.

(a) Must have at least fifteen days between the teste and return.

Upon

Upon default of appearance, and no *essoign*, the plaintiff shall have an *attachment*, and afterwards a *distringas*. 2 Inst. 124. 1 Brownl. 128.

How if no appearance nor *essoign*.

And by the *common law* the process to compel an appearance was by distress infinite. *Ibid.*

But now by the statute of Marlbridge, if the defendant does not appear, nor cast an *essoign* on the first distress, or before, there shall be judgment for the plaintiff, and a writ (a) to the bishop. 2 Hen. 4. 1. b. 2 Inst. 124. 1 Brownl. 158. Dy. 353. b.

But if the party be not actually summoned, there shall not be judgment upon default at the distress. 1 Mod. 248. 2 Mod. 264.

By the common law, and now by the stat. art. sup. chart. 15. in summonses and attachments, there ought to be fifteen days exclusive between the *teste* and return at least. 2 Inst. 567.

Of the teste of summons, &c.

And by the stat. of Marlbridge, in *quare impedit*, or *darrien presentment*, there ought to be only fifteen or twenty-one days before the return.

And the summons ought to be *tested* the same day it issues, that there may be no prejudice in respect of *lapse*. Reg. 30. a. Bro. Qu. Imp. 151.

If the injury done to the plaintiff, or the delay arises from the bishop alone, as upon pretence of incapacity or the like, then he only is named in the writ.

Who to be named in the writ.

But if there be another presentation set up, then the pretended patron and his clerk are also joined in the action.

Or it may be brought against the pretended patron and his clerk, leaving out the bishop.

Or against the patron only.

But it is generally brought against all three; for if the bishop be left out, and the suit is not determined till six months are past, the bishop is entitled to present by *lapse*; but if he is named, and is made a party to the suit, no *lapse* can possibly accrue till the right is determined; and therefore it is always most advisable to make him a party. Cro. Jac. 93.

If the *patron* is left out, and the writ is only brought against the bishop and the clerk, the suit is of no effect, and the writ shall abate. Hob. 316. For the right of the *patron* is the principal question in the cause. 7 Rep. 25.

And if the clerk is left out, and has received institution before the action brought (as is sometimes the case), the

(a) i. e. A writ *ad admittendum clericum*; but then, before such writ, there must be a writ of inquiry to inquire of four points, which *vide post*. 229.

patron plaintiff, by his suit, may recover the right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant and party to the suit, to hear what he can allege against it: for which reasons, it is the safer way to insert them all three in the writ.

Of the writ of
ne admittas.

If the clerk of the *pseudo* patron has not been instituted, or if the plaintiff suspects that the bishop will admit the defendant's, or any other clerk, pending the suit, he may, immediately upon suing out the writ of *quare impedit*, sue out also a prohibitory writ, called a *ne admittas*, which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever, till such contention be determined. The writ of *ne admittas* is to this effect:

Form thereof.

"GEORGE the Third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth: To the reverend father in God, Thomas, by Divine Providence bishop of greeting.—We prohibit you, that you admit a person to the church of which is void, as it is said, and concerning the advowson whereof an action is commenced in our court of the Bench, between A. B. esq. and you and C. D. esq. until it shall be discussed in the said court, Whether the said advowson belongeth to the said A. or to you and the said C. Witness ourself at Westminster, the day of in the thirty-sixth year of our reign," &c.

The effect
thereof.

If the bishop doth, after the receipt of this writ, admit any person, even though the patron's right may have been found in *jure patronatus* (a), then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by *writ of sci. fa.* 2 Sid. 94. and shall have a special action against the bishop, called a *quare incumbavit*, to recover the presentation, and also satisfaction in damages for the injury done him by incumbering the church by instituting the clerk pending the suit, and after the *ne admittas* received (b).

Jure patronatus, what.

(a) A *jure patronatus* is a commission from the bishop, which he is bound to issue if requested by either of the contesting patrons, or their clerks, directed usually to his chancellor, and others of competent learning, who are to summon a jury of six clergymen, and six laymen, to inquire into and examine who is the rightful patron. 1 Burn, 16, 17.

(b) But if the bishop has incumbered the church by instituting a clerk before the *ne admittas* issued, *quare incumbavit* lies: for the bishop hath no legal potestie, till the writ of *ne admittas* is served upon him.

If one defendant should appear before the others, the plaintiff may declare against him *simul cum*, &c. 1 Brownl. 159.

If one defendant appear before another.

Summons and severance lies if one plaintiff will not sue.

1 Brownl. 158.

And if the writ abates, it may be brought by *journies accumps.* Ibid.

The writ may be general, and the count thereon *special*. F. N. B. 33. a. 5 Co. 102. b. 10 Co. 135.

(B) Of declaring in *Quare Impedit*.

Quare impedit being a possessory action, cannot be maintained without a possession; for which reason the plaintiff must always declare upon a *presentation* made by himself, or his ancestor, as one whose estate he hath, or by the grantee of the next avoidance, or by his lessee for life or years.

How plaintiff must declare.

And the plaintiff in his declaration must shew a title to present.

And if he claims a right to present against common right, he must shew the commencement of it; as if he alleges presentations by turns he must shew how this commenced, by prescription, composition, or otherwise. Dy. 299. 3 Leon. 163.

What title must be shewn.

And the plaintiff must shew a title in him before the avoidance. Dyer, 129. b. Bend. pl. 79.

And if there are several plaintiffs, and they vary in title, the writ abates. R. Mod. 184.

The plaintiff ought also to allege a presentment by himself or his ancestor, or some other under whom he claims. Vaugh. 7. 17. 57. But though it is generally necessary to allege a presentment, the want thereof will be cured by a verdict. Stra. 1006.

In a *quare impedit* for a united church, the patron ought to shew a presentation either to the united church, or to one of the old churches. Ld. Raym. 201, 202.

A purchaser may allege a presentment by the vender. 2 Inst. 356.

And if the plaintiff alleges a presentment without a precedent title, he must say it was *tempore pacis*. 1 Mod. 230.

But he need not, if a precedent title is alleged. R. 1 Mod. 230.

But if a presentment be alleged by a common person, he must say, that the clerk was thereon instituted and inducted. Bend. pl. 297.

The last presentment regularly shall be mentioned; and therefore if the bishop presents by *lapse*, upon the next avoidance

avoidance the patron in *quare impedit* shall make mention of that. 3 Leon. 18. Dal. 75.

And the plaintiff ought also to allege a disturbance.

How if suit be
by executor.

And if the suit be by an executor or administrator, upon an avoidance in the life of the testator, an allegation of the disturbance in the life of the testator is sufficient. R. Sav. 95. Lutw. 2.

(C)

(C) Of Pleading and Proceeding at the Trial.

Pleadings in
quare impedit
intricate.

The pleading in this action is very difficult, by reason of the variety and uncertainty of the rules concerning it. And therefore Lord Hobart advises plaintiffs in *quare impedit* to name no more defendants than needs must be; and particularly the *bishop* not to be named, if an incumbent be instituted before the *quare impedit* brought; for then the bishop can do no more hurt to the plaintiff, for he can but institute pending the *quare impedit*. 2dly, Not to name more disturbers than such as are like to have reasonable titles; for every disturber may make several titles, or confess and avoid the plaintiff's title, and if any pass against him he is barred. Hob. 320.

Of imparling.

To a declaration in *quare impedit* the defendants may imparl, and afterwards may either join or plead severally. Bro. Q. Imp. 137. 165.

Of pleading in
abatement.

And they may plead in abatement, or to the action. But the ordinary cannot plead in *abatement*, or cast an *essoign*, without making himself a disturber. Hob. 200.

Of pleading in
bar.

Every defendant may plead the *general issue*, which is *ne disturba pas*; because the plea doth not defend the wrong wherewith he stands charged, and leaves the plaintiff's title not only uncontroverted, but in effect confessed; and the plaintiff may upon that plea presently pray a writ to the *bishop*, or at his choice maintain the disturbance for damages. Hob. 162. Vaugh. 58.

Of the plea by
bishop;

But the *bishop* generally, when made a party to the suit, to shew that he is not a disturber, pleads in bar of the action, that he claims nothing but as *ordinary*. Hob. 198. Keil. 43. 2. Co. Ent. 498. d. 38. Ed. 3. 2.

He must disclaim, or admit himself a disturber. Hob. 320. And if he refuses a clerk, without cause, he is a disturber. 1 Leon. 230.

and judgment
against him.

Upon such plea by the *bishop*, the plaintiff may have judgment against him with a *writ* but a *cesset executio*, till the other pleas are determined. Hob. 320. Vaugh. 6. Keil. 43. But if a *cesset executio* is not entered, it is only form. 1 Rol. 363. But if there be not a *cesset executio*, it is error,

if execution be before the other pleas are determined.
Ibid.

If the clerk of the *pseudo patron* has been instituted, he generally pleads that he claims nothing but as *persona impersonata ex presentatione* of such a one. Or he may plead *plenarty* of the plaintiff, or a stranger; and by the common law, *plenarty*, before the writ for any time, was a good plea.
2 Inst. 360.

Of plea by clerk of *pseudo patron*.

But now by the stat. Westm. 2. c. 5. it must be *plenarty* for six months before the action brought to be a sufficient bar of the plaintiff's action, to recover the presentation, if the plaintiff prevails.

Of plea of *plenarty*.

In pleading *plenarty*, for six months, by the presentment, either of the plaintiff himself, or by collation, or by lapse by the ordinary, the incumbent need not make title. Noy, 30. But where he pleads the presentment of a stranger, he ought to shew title. But *plenarty*, even for six months, is no plea against the king, according to the rule *nullum tempus occurrit regi*. 2 Inst. 361.

The defendant *patron*, if he does not rely on the *general issue*, or plead a release, must set out a title, and traverse the plaintiff's; but if he shews a title, subsequent to the plaintiff's he need not traverse the plaintiff's title, for then he confesses and avoids it.

Of plea by defendant *patron*.

In replying to the defendant's plea and title, it is not sufficient for the plaintiff to destroy that title, without maintaining his own title. Vaugh. 6c.

The contesting parties go on to *issue* or *demurrer*, and the proceedings therein are the same as in other cases; but in this action the plaintiff must recover upon the strength of his own right, and not by the weakness of the defendant's. Vaugh. 7, 8.

Of subsequent proceedings.

Upon the trial the plaintiff is put to make out his own title; and upon failure thereof, the defendant is put upon the proof of his, in order to obtain the judgment for himself, if needful.

How title must be proved on trial.

If upon the trial the right be found for the plaintiff, the jury are to inquire of *four things*.—1. Whether the church is full. 2. Of whose presentation; for if it be of the defendant's presentation, his clerk is removable, if made a party to the suit, and the plaintiff commenced his action in due time, *i. e. infra tempus semestre*, by writ. 3. In case of *plenarty* upon an usurpation, whether *six calendar months* have passed between the avoidance and the time of bringing the action; for if *six months* [calendar months, not lunar, as in temporal matters] have passed, it will not be within the statute Westm. 2. which permits an usurpation to be divested

Of the four things necessary for jury to inquire.

by a *quare impedit* brought *infra tempus semestris*. 2 Inst. 261.
 4. Of what value yearly the living is, and this in order to assess damages according to the stat. Westm. 2: before which no damages were allowed; but by that statute, if *six months* pass by the disturbance of any, so that the bishop do confer to the church, and the patron loseth his turn, damages shall be awarded to two years value of the church; and if six months be not passed, but the presentment be deraigned within the said time, then damages shall be awarded to the *half-year's* value of the church.

(D)

(D) Of the Writ of Inquiry, &c.

If judgment by default.

If all the defendants make default upon the *distress*, the plaintiff has judgment against all, for all are supposed disturbers. R. Mod. 81. and that without title made. F.N.B. 38. 11. Semb. cont. 1 Brown. 158.

If on demurrer.

But if the plaintiff recovers upon *demurrer*, there must be a *writ of inquiry* issued to inquire of the preceding *four points*, before the plaintiff has final judgment, and a writ to the bishop. R. Mod. 81.

If jury omit to inquire at the trial.

Or after a verdict for the plaintiff, if the jury have omitted to inquire of these points, there shall be a *writ of inquiry*; and till this is executed, the writ to the bishop shall stay. 1 Bro. Ent. 327.

If the patron and incumbent confess the action, or *nil dicunt*, &c. there shall be judgment for the plaintiff, and a writ to the bishop.

Of the damages:

If the church remains void, the plaintiff shall recover no damages; and if the jury assess them, a *remittitur de damnis* must be entered. 3 Lev. 59. 2 Inst. 362.

The damages are to be recovered against the disturber; and therefore if the incumbent counterplead the title of the plaintiff as well as the patron, the plaintiff shall recover the value as well against him as against the patron. But no damages shall be recovered against the bishop, where he claims only as ordinary—and *note*, The king is not within the statute, because by his prerogative he cannot lose his presentation. 6 Co. 52.

(E)

(E) Of the Judgment in *Quare Impedit*, &c.

Effect of judgment,

If it be found that the plaintiff hath the right, and hath commenced his action in due time, then he shall have judgment to recover his presentation; and if the church be found to be full, by the institution of any clerk, to remove him, unless

unless it were filled *pendente lite*, by lapse to the ordinary, he not being a party to the suit, in which case the plaintiff loses his presentation *pro hac vice*, but shall recover two years full value of the church from the defendant, the pretended patron, as a satisfaction for the turn lost by his disturbance; or in case of his insolvency, he shall be imprisoned for two years. Stat. Westm. 2. c. 5. s. 3.

If the action was commenced within six months, and the plaintiff have judgment to recover his presentation, and the church be full, whereby the former presentment shall be de-raigned, then damages shall be awarded to the plaintiff for half a year's value of the church.

Upon the plaintiff's recovering his presentation, the writ issued in consequence thereof is a writ directed to the bishop, called a writ *ad admittendum clericum*; which recites the judgment of the court, and orders him to admit and institute the clerk presented; and if upon this order he does not admit him, (the clerk being duly qualified,) the patron may sue the bishop in a *quare non admisit*, and recover ample satisfaction in damages.

The writ *ad admittendum clericum*, is to this effect:

"GEORGE the Third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth: To the reverend father in God, Thomas by Divine permission bishop of _____ greeting.—Whereas A. B. has lately in our court, before our justices of the Bench, in Westminster, by the consideration of the same court, recovered against you and E. F. clerk, and C. D. his presentation to the rectory and parish church of _____ in our county of _____ and your diocese, which became vacant, and belongs to his presentation: and whereupon it was considered by our said court of the Bench, that the said A. should have our writ to you the said bishop, the ordinary of that place, to be directed; and notwithstanding your disclaimer, and the claims of the said E. F. and C. D. or either of them, you should admit a fit person to the rectory and parish aforesaid, at the presentation of the said A. We therefore command you, that notwithstanding your disclaimer, or the claims of the said E. F. and C. D. you admit a fit person to the rectory and parish church aforesaid, at the presentation of the said A.: and how you shall have executed this our writ, certify to us on _____ wheresoever we shall then be in England. Witness Sir James Eyre, knight, at Westminster, the _____ day of _____ in the thirty-sixth year of our reign," &c.

as to the presentation;

as to damages.

Of the writ *ad admittendum clericum*.

Form thereof.

When judgment to be given.

By the stat. of Westm. 2. c. 30. the judge of *nisi prius* has power to give judgment immediately; yet if he do not, upon the return of the *poslea*, judgment may be given by the court to which the return is made.

How if plaintiff nonsuited.

If the plaintiff is nonsuited, the judgment is peremptory, and the defendant shall have a writ *ad admittendum clericum* to the bishop. 1 Brownl. 161. But not before *tute* made. F. N. B. 38. k.

If judgment on demurrer.

But if he has judgment upon *demurrer*, he shall have a writ to the bishop presently.

But the defendant cannot have a writ to the bishop, if the *quare impedit* abates for form, misnomer, or insufficiency. R. 7 Co. 27. b. F. N. B. 38. m.

How ordinary to obey the writ.

Note; If the ordinary does nothing upon the writ *ad admittendum clericum*, the party may have an *alias* and *pluries*, which may be returnable, and after that an attachment. Reg. 42. a. 80. F. N. B. 38. c. Dy. 254. b. 350. a.

There was a fine of 10*l.* for a bad return upon the first writ, and an *alias* under the penalty of 100*l.* 3 Leon. 139.

If the incumbent of which the church is full, was not a party to the writ, he shall never be removed. Co. Lit. 344. b.

Of costs.

Of writ of error.

By the 3 Hen. 7. c. 10. [which gives *costs* upon writs of error brought if judgment be affirmed] if the defendant bring a writ of error, and the judgment be affirmed, the plaintiff shall recover his costs and damages for his wrongful delay.

By virtue of this statute, the court of King's Bench have, upon a writ of error, awarded damages according to the value of the church found by the verdict. Cro. Jac. 145. 175.

Of damages.

But as the real damages which the plaintiff sustains is only the being kept out of the half-year's value, the legal interest on that seems to be all that he is entitled to. Stra. 931.

Of the construction of the different statutes relating to costs.

In *quare impedit* the bishop pleaded to claim, but as ordinary, judgment passed against C. for non-appearance on a *distringas*. And an issue between the plaintiff and incumbent on the right of presentation was tried, and a verdict found for plaintiff. Afterwards a writ of inquiry was awarded to inquire of the *four usual* matters. And by the inquisition it was returned, that the vicarage was full of the defendant (incumbent) on the presentation of the king—that it began to be vacant 26th June 1746, on the death of J. R. clerk, and that the value by the year was 120*l.* On which return, plaintiff moved for *costs*, damages being given by stat. Westm. 2. and by the statute of Gloucester, costs are given in all cases where damages, and cited 3 Lev. 35. Skinn. 25.

On

On shewing cause, the rule was discharged. The statute of Gloucester, 6 Edw. 1. relates to cases at common law, and statutes antecedent. The subsequent statute of Westm. 2. [13 Edw. 1.] created damages in *quare impedit*, where there were none before at common law, and gives *two years* value where the term is lost by disturbance and lapse *pendente lite*; if not, and the living full, then half a year's value. *Penfold's case*, 10 Co. where the damages are created, (none before,) there no costs; where the damages are additional, there costs. Sir T. Jones, 234. Keilway, 26. In *quare impedit*, the king has no damages, because he is not within the statute of Westm. Hob. 23. If a writ of error is brought, and the judgment affirmed, then costs are given by the stat. Hen. 7. No costs in any other instance. *Loman v. Bishop of London*, Crespin, Clerk, and Coke, Barnes, 139.

SECTION IV.

Right, Writ of.

The writ of right is the highest writ in the law. It only lies of an estate in fee-simple, and is used either when no *possessory* action can be brought on account of the statute of limitations having attached, or when such action has been brought and judgment given against demandant. What, and when to be brought.

Even the remedy by writ of right must be prosecuted within sixty years of the person under or through whom demandant claims; for after sixty years uninterrupted possession, no title is suffered to be impeached.

And in order to maintain a writ of right, the demandant must shew an *actual seisin* either in himself or his ancestor from whom he claims by *taking the esplees*. *Dally v. King*, 1 H. Blac. 1.

Of the Proceedings therein.

Get writ of curfitor upon which sheriff must cause the tenant to be *summoned* by good summoners, which must be by personal service, or on the land, and *proclamation* must be made at the most usual door of the parish church where the lands lie. Sheriff must make return of writ, indorsing thereon the names of the *summoners* and the day he made proclamation. Upon default of tenant in *not appearing* nor *essoigning* on return of writ, a *grand cape* issues commanding sheriff to seize the lands demanded. Tenant may on return thereof come in and save his default which is generally the case.

case. Demandant then declares or counts. Tenant pleads, if the general issue, he does not conclude to the country in the usual way, but he puts himself upon the grand assize, praying a recognition to be made whether the greater title be in him or in demandant. Upon the issue or mesne as it is called, being so joined between the parties, a writ or summons is directed to sheriff commanding him to summon four knights girt with swords, to be before the justices at Westminster on the return of the writ, to make election of the grand assize, between demandant and tenant. If sheriff make no return thereof, an alias writ of summons issues, which is returned with the names of the four knights summoned. Upon the return thereof, the four knights appear in court, and being placed in the jury box, are severally sworn lawfully and truly to choose twelve knights girt with swords, of themselves and others, which best know and will declare and say the truth between the parties. The four knights having chosen of themselves and others twenty-four, a writ of venire facias then issues, commanding the sheriff to cause to come before the justices of C. B. the four knights and the other persons named by them, recognitors, chosen to make recognition of the grand assize between the demandant and tenant. Upon the day of trial, the recognitors appear, or best part of them, who are sworn, and try the matter of right between the parties. If they give a verdict for demandant, he has judgment to recover his seisin against the tenant to hold to him and his heirs quit of the said tenant and his heirs for ever.

See Booth on Real Actions, and the case of *Tyssen* and *Clerk* in *Wilson's Reports*.

SECTION V.

Waste.

Waste, what.

Waste is the committing any spoil or destruction in houses, lands, &c. by tenants, to the damage of the heir, or him in reversion or remainder: whereupon the writ or action of waste is brought for recovery of the thing wasted, and damages for the waste done.

How prohibited by statute.

The stat. 52 Hen. 3. c. 22. f. 2. enacts, "That farmers during their terms shall not make waste, sale, nor exile of house, woods, and men, nor of any thing belonging to the tenements that they have to farm; unless they have special licence by writing or covenant, mentioning that they may do it. Which thing if they do, and thereof be convicted,

"convicted, they shall yield full damages, and shall be amerced grievously."

For an exposition of this statute, see Bac. Abr. 5 Vol. 460.

Waste may be committed, not only in houses and lands, but in gardens, orchards, timber trees, dove-houses, warrens, parks, fish-ponds, and other subjects of property. Where committed.

There are two kinds of waste, viz. *voluntary* or *actual*, and *negligent* or *permissive*. *Voluntary* may be done by actual pulling down or prostrating houses, or cutting down timber trees; *negligent*, by suffering houses to be uncovered, whereby the timber and spars are rotted. Waste, voluntary or negligent.

The persons who may be injured by waste, are such as have some interest in the estate wasted; as a *remainder-man* or *reversioner*. What shall be deemed waste, and what not, vide Bac. Abr. 461. &c. and Com. Dig. 5 Vol. 638. and *vide ibidem*, by whom, and against whom, waste lies. Who may be injured thereby.

See also the cause of *Pyne v. Dor*, 1 D. & E. 54., in what cases tenant for life, without impeachment of waste, will be restrained. Of the meaning of, without impeachment of waste.

It may be proper to consider—

- (A) The Remedy in Waste.
- (B) The Process in Waste.
- (C) The Count in Waste.
- (D) The Pleadings and View.
- (E) The Judgment in Waste.

(A) Of the Remedy in Waste.

(A)

The redress for the injury of waste is of two kinds, *preventive* and *corrective*: the former of which is by writ of *estrepement*, the latter by that of *waste*. Remedy, two kinds.

The writ of *estrepement* was a remedy at common law, after judgment obtained in any action real, and before possession was delivered by the sheriff, to stop any waste which the vanquished party might be tempted to commit in an estate, which was determined to be no longer his. Writ of estrepement.

The stat. of Gloucester gave the writ of *estrepement* also, *pendente placito*, to inhibit the tenant from doing waste till the suit was determined.

Besides this preventive writ at common law, the courts of equity, upon bill exhibited therein, complaining of waste and destruction, will grant an *injunction*, in order to stay waste. Injunction in equity.

waste until defendant shall have put in his answer, and the court shall make further order; which is now become the usual way of preventing waste.

Writ of waste,
partly given by
statute.

Besides the above methods to prevent waste, there is an action of waste, partly founded at common law, and partly upon the stat. of Gloucester, 6 Edw. 1. c. 5. by which "a man " may have a *writ of waste* in Chancery against a man who " holds by the law of England, or in other manner, for term " of life, or years, or in dower; and he who shall be at- " tainted of waste, shall lose the thing which he has wasted, " and make a satisfaction of *treble* of what the waste shall be " taxed at."

This statute gave a *writ of waste*, but before this, by the stat. of Marl. 52 Hen. 3. a writ of prohibition was given for waste.

Of the process
thereon given
by statute.

After which statutes, the stat. Westm. 2. 13 Edw. 1. c. 14. enacted, "That of all manner of waste done to the damage " of any person, there shall henceforth be no writ of *prohibi-* " *tion* awarded, but a writ of *summons*; so that he, of whom " complaint is, shall answer for waste done at any time. " And if he come not after the *summons*, he shall be at- " tached; and after the *attachment*, he shall be distrained. " And if he come not after the distress, the sheriff shall be " commanded, that in proper person he shall take with him " twelve, &c. and shall go to the place wasted, and shall in- " quire of the waste done, and shall return an inquest; and " after the inquest returned, they shall pass unto judgment, " like as it is contained in the stat. of Gloucester."

By whom main-
tainable.

And by c. 22. of the same statute, the action of waste is maintained by one *tenant in common* against another. The equity of which extends also to *joint-tenants*, but not to *coparceners*; because they might make *partition*, and so prevent waste.

Nature of the
action.

The action of waste is a mixed action; partly real, so far as it recovers land, &c. and partly personal, so far as it recovers *damages*.

Action on the
case, now sub-
stituted for it.

But this mixed action is now seldom used, the general mode of proceeding by the reversioner against the tenant for waste, being by an action upon the case, in the nature of waste, which is a common personal action, in which *damages* for the waste done can only be recovered.

(B)

(B) Of the Process in Waste.

Of the pro-
ceedings.

The process incident to an action of waste is a *summons* on the *original*, which the *curfitor* will make out from a *precipe*.

If

If it is against tenant in *dower*, or guardian, it does not recite the statute; but if it is against the tenant for life, or years, or by the curtesy, it does.

By summons.

The writ is to this effect, if against tenant in *dower*:

"The king, to the sheriff of If A. shall make you
"secure, &c. then summon, by good summoners, B. who Form thereof
"was the wife of C. that she be before our justices at West- against tenant
"minster, on, &c. to shew wherefore she hath committed in dower.
"waste, sale, destruction, and banishment of lands, houses,
"woods, gardens, &c. which she holds in dower, of the
"inheritance of the aforesaid A. in to the dishe-
"rison," &c.

If against tenant for life or years, it is to this effect:

"The king to the sheriff of If A. shall make you Against tenant
"secure, &c. then summon, &c. B. &c. Wherefore seeing for life or years,
"that it is provided by the common council of our realm of
"England, that it shall not be lawful for any person to
"commit waste, sale, or destruction of lands, houses,
"woods, or gardens, the same B. hath committed waste,
" &c. of the lands, houses, woods, and gardens in L. which
"the aforesaid A. demised to him," &c.

For other forms, see Fitzherbert's *Natura Brevium*, &c.

If waste is brought by the bishop, or ecclesiastical person, the writ concludes *ad exheredationem episcopi vel ecclesie*. How writ to conclude.

On the return of the *summons*, the defendant may *essoign* and the plaintiff adjourn, &c.

In waste, *summons* and *severance* lie, for the writ is *ad exheredationem*, and it is a plea real. 2 Inst. 307.

If the tenant does not appear at the return of the *summons*, then plaintiff applies to the *filazer* of the county, for a *poñe* or *attachment*, which is to the same effect; only "command- How if no ap-
"ing the sheriff if A. shall make him secure, to put B. by pearance.
"safe gages and pledges," &c. On the return of which the
plaintiff may apply for a *distringas*, commanding the sheriff to
distrain, the tenant to appear, &c.

If the tenant appears, the plaintiff declares against him, and the tenant pleads, or lets judgment pass by default. If the tenant does not appear, a writ of inquiry goes to the sheriff; and on return thereof, plaintiff has judgment: of which, *vide post*, title Judgment in Waste.

In waste against two by the bishop *ad exheredationem ecclesie*, and process continued till the grand distress returned, one came and the other made default; and he who appeared was How if one ap-
pear and the
other makes
default.

was

Of the proclamation.

was compelled to answer alone, for the process is determined against the other. Bro. tit. Waste, pl. 99.

When the summons is served upon the tenant, or upon the land, *fourteen days* before the return thereof, *proclamation* must be made of the summons on a Sunday, at or near the most usual door of the church or chapel of the town or parish where the lands lie, and that proclamation must be returned, together with the names of the summoners, pursuant to the 31 Eliz. c. 4.

(C)

(C) Of the Count in Waste.

How defendant to be charged.

The plaintiff must charge the defendant in the *tenet* or *tenuit*, for there is no other form. Cro. Eliz. 356.

And must charge him as assignee, executor, &c. or according to the defendant's tenure.

What the count must shew.

And the count must shew how plaintiff is entitled to the inheritance, as, if rector, he must shew that he is so. If he counts upon a lease by himself, he must shew his seisin in fee and demise to defendant. If upon a lease from his ancestor, he must shew *seisin*, a demise to defendant and descent to himself. If he claims by fine, he must shew it, and the uses of it. So if by common recovery; so if by grant of the reversion; so if he and defendant are joint-tenants, he must shew that they are so: so if he and the wife sue in right of the wife, if he has the reversion, he shall say the defendant holds of him; otherwise, if he in remainder brings waste; or if the lord by escheat does, for there is no tenure of him, Hutt. 110.

It must be conformable to writ.

The declaration also must be conformable to the writ; for if the writ is for waste in land, and it is assigned in cutting wood, it is bad.

So, if the writ is for waste in three *villes*, and the declaration is for waste in one or in another *ville*.

The declaration must also particularise the quality and quantity of the waste: as if in cutting trees, it must shew the number of the trees; if in houses, it must shew the defects.

How to conclude.

And must conclude if to his own disherison, *ad exharedationem* of the plaintiff.

If of lands whereof he is seised in right of his wife, *ad exharedationem* of the wife.

And if by a bishop, &c. it must conclude *ad exharedationem ecclesie*. 2 Roll. 832. l. 30.

(D) Of

(D) Of the Pleading and View in Waste.

(D)

Defendant in waste may plead in abatement of plaintiff's title; as if he entitles himself to the reversion *in fee*, defendant may shew a devise to him *in tail*. Lutw. 1557. Of pleading in abatement.

As to pleas in bar, defendant may plead *no waste done*, which is the general issue, and this admits nothing, but puts the whole declaration in issue. Lutw. 1547. Or he may plead a release: or to waste in the *tenuit, accord and satisfaction*. Croll. 357. Of pleading in bar.

So, defendant may justify, that he took for repairs; so that he took for necessary *votes*; or that the trees were *aride mortue*, and neither bore fruit or foliage; or that the lease was without impeachment of waste: or he may plead no demise to him; or that a *mesne remainder-man is alive*.

Or he may plead in excuse *quod reparavit* before action brought, or that he rebuilt, and has since kept in repair. Or that the premises were so ruinous at the commencement of his lease, that he could not repair. Mo. 54.

After issues joined, the *venire facias* recites the issues, and commands the sheriff that he cause to come twelve, &c. to inquire if the defendant hath committed waste as plaintiff alleges. Cro. Car. 381. Of the proceedings after issue.

In waste, if issue is joined, the jury ought to have a view of the place or places wasted, otherwise trial shall be stayed: and six at least must have a view. 2 Saund. 254. And the *venire facias* must be that the jury shall have a view. Of the view when necessary.

So, if there is judgment for want of appearance to the *distingas*, there must be a view and inquisition taken, as well as upon issue joined. R. Ow. 12. For the law will not suffer so heavy a judgment as the forfeiture of the thing or place wasted, and *treble damages* to be passed upon a mere default, without full assurance that the fact is according as it is stated in the writ.

But upon default made after appearance and plea, there shall be no inquiry of *waste*, for this case is not within the purview of the statute of Westm. 2.; 2 Inst. 390; but inquiry of the damages only. When no view necessary.

Nor shall there be inquiry of the *waste*, upon a judgment by *confession*, *nil dicit*, or *non sum informatus*, but inquiry of the damages only: for the waste is confessed. Cro. Eliz. 18. Hutt. 44.

(E) Of

(B)

(E) Of the Judgment in Waste. (D)

The effect of
the judgment.

By the statute of Gloucester, plaintiff in an action of waste is to recover the thing wasted, and *treble damages*.

If the judgment is against the defendant in the *tenet*, then it shall be for the place, and the *treble damages* found by the inquest.

But if it is against him in the *tenuit*, judgment shall be for the *damages only*.

If waste be assigned in three houses, two gardens, &c. the jury ought to find damages severally for every of them; for if it be but of small value for any of them, the court will not adjudge it waste as to that part: but if the jury gives entire damages, it shall not be intended that there were *petit damages* in any, and therefore the verdict will be good. Cro. Car. 414. 452.

If verdict is for defendant, the judgment shall be *quod querens nil capiat*, &c. and defendant *eat inde sine die*.— 2 Saund. 247.

And if the defendant will not pray judgment to avoid a writ of error, it may be entered upon the prayer of the plaintiff against himself. 2 Saund. 253.

Of recovering
the place waste-
d and damages.

If plaintiff recovers upon the *tenet*, he has a writ of *seisin* for the place wasted, provided the particular estate be still subsisting (for if it be expired, there can be no forfeiture of the land): and the damages are to be recovered in the same manner as all other damages, by *ca. fa.*, *fi. fa.*, or *elegit*.

CHAPTER XVI.

Of Proceedings in particular Cases.

SEC. 1. *Arbitration.*SEC. 2. *Audita Querela.*SEC. 3. *Habeas Corpus.*SEC. 4. *Outlawry.*SEC. 5. *Prohibition.*

SECTION I.

Of Arbitration.

MUCH reading may be found in the books upon the law of arbitration; but in the present work nothing more is necessary than to shew the practical proceedings in cases of references, and the mode of enforcing obedience to awards.

The leading distinction is, whether the reference be such as can be carried into effect by the summary interposition of the court? *i. e.* by attachment; or, whether the party must resort to his action upon the award?

Distinction as to the remedy on awards.

A submission to arbitrators may be made either *after* an action is brought, and whilst it is depending, or *before* any action is commenced. Now at common law, where a cause is depending, the court has jurisdiction over the subject matter by the action being brought, and therefore at any time pending the suit, even before trial, if the parties wish to enter into a submission to abide by an award, they may obtain an original rule of court for that purpose, and may afterwards give efficacy to that rule by attachment; but if the reference be made *at* the trial, which is often done, it is then by order of *nisi prius*, which order may be afterwards made a rule of court; so that in all cases of reference pending a cause, the submission of the parties may either in the first instance or afterwards be made a rule of court, and enforced by the process of the court.

According as submission is pending an action or not.

How if pending an action.

But inasmuch as it was often expedient to refer matters in dispute to arbitration, *without* any action being brought, and yet for want of the parties being before the court, no rule of court could at common law be made upon them, and so no

How if no action.

Of stat. 9 & 10
W. 3.

Its operation.

remedy by attachment in such case be had, the legislature interposed, and by the stat. 9 & 10 W. 3. remedied the evil, thereby putting laws of arbitration, where *no suit* is pending, upon an equal footing with those where there is a *cause* depending. This is the true operation of the statute; for as to arbitrations where a cause is depending, it is only declaratory of what the common law was before. Burr. 701.

Now therefore, in all cases without any action depending, it is in the power of the parties submitting to arbitration to proceed upon the statute, and have the summary remedy by attachment: but if the statute be not adhered to, they must proceed as at common law.

In the treating of this subject, we will consider the proceedings in cases—

(A) Of References to Arbitration, where no Cause is depending, according to the Stat. 8 & 9 W. 3.

(B) Of such References where the Case is not within the Statute, nor made pending any Cause.

(C) Of References made *after Action* brought, but *before Trial*, or *at the Trial*, by Order of *Nisi Prius*.

(D) General Observations as to the Extent and Operation of the Submission, enlarging the Time for making the Award, setting aside the Award, &c.

(A) (A) Of References, where no Cause is depending, according to the Statute.

Stat. 9 & 10
W. 3.

By the stat. 9 & 10 W. 3. c. 15. reciting, that "Whereas it hath been found by experience, that references made by rule of court have contributed much to the ease of the subject in the determining of controversies, because the parties become thereby obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt, in case they refuse submission; now, for promoting trade and rendering awards of arbitrators the more effectual in all cases for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade, or other matters, *Be it enacted*, &c. That it shall and may be lawful for all merchants and traders, and others, desiring to end any controversy, suit, or quarrel, controversies, suits, or quarrels, for which there is no other remedy than by personal action, or by suit in equity, by arbitration *to agree,*
" that

"that their submission of their suit to the award or umpirage of
 "any person or persons should be made a rule of any of his Ma-
 "jesty's courts of record which the parties shall choose, and to
 "insert such their agreement in their submission, or the condition of
 "the bond or promise, whereby they oblige themselves re-
 "spectively to submit to the award or umpirage of any per-
 "son or persons; which agreement being so made and in-
 "serted in their submission, or promise, or condition of their
 "respective bonds, shall or may, upon producing an affidavit
 "thereof, made by the witnesses thereunto, or any one of
 "them, in the court of which the same was agreed to be
 "made a rule of court, and reading and filing the said affidavit
 "in court, be entered of record in such court, and a rule shall
 "thereupon be made by the said court, that the parties shall submit
 "to and finally be concluded by the arbitration or umpirage
 "which shall be made concerning them by the arbitrators or
 "umpire, pursuant to such submission; and in case of disobe-
 "dience to such arbitration or umpirage, the party neglect-
 "ing or refusing to perform and execute the same, or any
 "part thereof, shall be subject to all the penalties of con-
 "temning a rule of court; and the court, on motion, shall
 "issue process accordingly; which process shall not be stop-
 "ped or delayed in its execution by any order, rule, com-
 "mand, or process of any other court, either of law or
 "equity, unless it shall be made appear, on oath, to such
 "court, that the arbitrators or umpire misbehaved them-
 "selves, and that such award, arbitration, or umpirage, was
 "procured by corruption or other undue means."

Parties may
 agree to make
 submission a
 rule of court,

which, upon
 affidavit, shall
 be done.

By the words of the statute, it must be inserted in the
 agreement or condition of the bond that the submission
 should be made a rule of court; but where in the end of the
 condition of the bond was this clause; "And if the obligor
 "shall consent that this submission shall be made a rule of
 "court, that then," &c.; on motion to make this submission
 a rule of court, and on cause shewn against it, as the party
 would rather have forfeited the penalty, the court held these
 conditional words to be a sufficient indication of consent, and
 made the award a rule of court. Salk. 72. Ld. Raym. 674.

How the con-
 sent must be
 expressed.

So where on motion to make a submission a rule of court,
 pursuant to the stat. 9 & 10 W. 3. objection, that the agree-
 ment to make the submission a rule of court was no part of
 the condition, but was underwritten, and not signed; but it
 appearing by affidavit, that the subscription was made before
 the execution of the bond, it was taken by the court to be
 part of the submission, as an indorsement by way of defea-

zance is part of the deed; and the submission was made a rule of court. *Carter v. Moufbridge*, Barnes, 55.

So a *parol* agreement and submission is not within the statute. 7 D. & E. 1.

What is evidence thereof.

Where the bond produced is executed only by one, the other may have the submission made a rule of court. Bar. 55.

What it must express.

But the consent expressed in the bond or agreement must be to make the *submission* a rule of court; if it is to make the *award* a rule of court, it is not within the act. *Harrison v. Gimary*, Str. 1178.

In order, therefore, for the submission to be within the statute, it must be in *writing*, and it must contain an agreement to make such submission a rule of court.

How to make submission a rule of court.

Having shewn what submissions are within the statute, the next thing is to point out how to proceed thereon, if the award is made in due time, and not impeached, [of which see *post*, (G),] provided the other party refuse to comply with it. First make the submission a rule of court, which is done by motion, and is absolute in the first instance; it must be moved upon an affidavit of the due execution of the bond, by the subscribing witness; which affidavit is to be engrossed on a treble 6d. stamp paper, and may be as follows:

Affidavit of subscribing witness to arbitration bond.

" T. S. of, &c. maketh oath and faith, that he was present
" at the time of signing and sealing the bond or obligation
" hereunto annexed; and A. B. of, &c. therein mentioned,
" did duly sign, seal, and as his act and deed deliver the said
" bond in the presence of this deponent; and that the name
" A. B. set and subscribed to the said bond, is of the proper
" hand-writing of the said A. B., and that the name T. S.
" set and subscribed, as the witness thereto, is of the proper
" hand-writing of this deponent."

Of service of rule, and making demand.

Get rule of clerk of rules in B. R. and secondary in C. B. make copy thereof, and of the award. Let the party who is to receive the money or thing awarded demand the same; and upon refusal make an affidavit of such demand and refusal, and also an affidavit of the execution of the award, which may be as follows:

" In C. B.

" Between { X. Y. Plaintiff,
and
R. W. Defendant.

Affidavit of service and demand, &c.

" X. Y. of, &c. maketh oath, and faith, that he this deponent, on the 10th day of November last, did personally
" attend from the hour of ten until the hour of twelve of
" the clock in the forenoon of the same day, at the Great
" Hall

" Hall of Lincoln's Inn, and then and there demanded of
 " the above-named R. W. who also attended, the sum of
 " 100/. awarded due to this deponent, pursuant and agreeable
 " to a certain award in writing, which is hereunto annexed ;
 " but the said R. W. did not then pay to this deponent the said
 " sum of 100/. or any part thereof ; and this deponent fur-
 " ther saith, that having, on Tuesday next after in this present
 " term, caused the submission of this deponent and the said
 " R. W. to the said award contained in a certain bond or
 " obligation, bearing date the 14th day of December 1794,
 " to be made a rule or order of this honourable court, he
 " this deponent, on the day of served the
 " said R. W. with a true copy of the said rule or order of
 " this honourable court, and at the same time shewed him
 " the said original rule or order ; and this deponent further
 " saith, that he did at the same time demand of him the said
 " R. W. the said sum of 100/. so awarded due to this de-
 " ponent ; and this deponent further saith, that the whole of
 " the said sum of 100/. now remains due and owing to this
 " deponent, pursuant to the said award."

" A. B. of, &c. gentleman, maketh oath, and saith, that
 " he did see C. D. of, &c. sign, seal, publish, and declare
 " his final award and arbitration between X. Y. of, &c. mer-
 " chant, and R. W. of, &c. goldsmith, bearing date the 10th
 " day of January 1795 ; and this deponent further saith,
 " that the name C. D. set and subscribed against the seal,
 " as the party executing the said award, is of the proper
 " hand-writing of the said C. D. and that the names A. B.
 " and J. E. set and subscribed thereto, as witnesses attesting
 " the execution of the said award, are of the respective
 " hand-writings of this deponent and the said J. E."

*Affidavit of due
 execution of the
 award.*

Upon these affidavits move for an attachment ; it is a rule
 to shew cause : get it of clerk of rules, or secondary, and
 serve copy thereof : at expiration of rule, move to make it
 absolute, on proper affidavit of service ; take it to crown-
 office, your clerk in court there will prepare attachment ;
 get a warrant thereon, and give it your officer to make the
 caption.

*Of moving for
 attachment.*

If the demand of the money or thing awarded be made
 not by the party entitled, but by a third person, there must
 be a letter of attorney for that purpose, and an affidavit of
 the due execution thereof ; and the power of attorney must,
 together with the award, rule, &c. be produced and shewn at
 the time demand is made.

*How if demand
 made by third
 person.*

If the subscribing witness refuse to make affidavit of
 the execution of the bond, the court, on motion, will com-
 pel him so to do. *Clark v. Elwick*, Str. 1. Bar. 58.

*Court will com-
 pel witness to
 make affidavit.*

(B) (B) Of such References where the Case is not within the Statute.

Of the remedy where the reference is made pending no action, and not according to statute,

When the submission, there being no action depending, is by *parol* or by written agreement, or by bond without any clause in the agreement or condition of the bond, that the submission should be made a rule of court, which the statute requires; the remedy in case of disobedience to any award made thereon is by action; either an action on the case, or debt upon the bond; in the last of which the penalty of the bond may be recovered; or of covenant, if the submission were by deed; but no attachment can go against the party. The proceedings therefore are as in other actions.

The court have no authority by 9 and 10 W. 3. c. 15. to make a *parol* submission to an award a rule of court. *Hyatt v. Evans*, 7 D. & E. 1.

(C) (C) Of References made after Action brought, but before the Trial or at the Trial, by Order of *Nisi Prius*.

A reference pending an action may be made by a rule of court originally; and this at any time before the trial, with the consent of the parties.

If the award be made, and either party refuses to comply with it, the other may proceed by attachment; as above described, (A).

If the demand is for taxed costs, a copy of the rule with the Master's allocatur thereon, must be shewn, together with the copy of the award, &c.

If the demand is made by letter of attorney, it must be by letter of attorney as *ante*, (A).

But the more usual way of referring causes to arbitration with the consent of the parties (for they cannot be without) is at the time of the trial. And this is done by the judge's order at *nisi prius*, which may afterwards be made a rule of court. And when there are bail in the action, it is advisable for plaintiff to take a verdict subject to the reference, which prevents the discharge of the bail, and gives him afterwards the election, should the award be in his favour, to proceed by attachment upon the award, or to take out execution: but neither can be done without leave of the court.

For the mode of proceeding on such references, see Vol. I. Ch. x. Sec. v. where references at *nisi prius* are treated of.

(D) Ge.

(D) General Observations.

(D)

- (D. 1) Upon the Extent of the Submission.
- (D. 2) Of the Revocation thereof.
- (D. 3) Of enlarging Time for making the Award.
- (D. 4) Of the double Remedy, by Action or Attachment.
- (D. 5) Of the Affidavits on moving for an Attachment, and of the Nature of the Attachment.
- (D. 6) Of the Costs on Arbitrations.
- (D. 7) Of impeaching and setting aside the Award.

(D. 1) Of the Extent and Operation of the Submission.

(D. 1)

On a reference to arbitration, the arbitrators can only have jurisdiction over such matters as are included in the reference. So that an award made upon a reference of all matters in difference between the parties does not preclude the plaintiff from suing upon a cause of action, subsisting against the defendant at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred. *Ravee v. Farmer*, 4 D. & B. 146.

Powers of arbitrators.

Of suing for cause of action subsisting at time of reference.

And it is material to observe the distinction between a submission to arbitration of all matters *in difference between the parties* in the cause, and a reference of all matters *in dispute in the cause* between the parties; for the *former* being general, is not confined to the subject-matter in the particular actions then depending, but will extend to cross demands between the parties, though not pleaded by way of set-off; and the costs being to abide the event, will make no difference; but the *latter* is confined solely to the matters in dispute in that particular cause.

Distinction to be observed in the words of a reference.

The submission made pending an action, must be by the parties to the record; and if afterwards from the award not being made in time, a second submission be made, that must also be made a rule of court.

What parties must make the submission.

A submission to an award between A. and B. the parties on the record having been made a rule of court, which award not having been made in due time, the dispute had

been

been referred to a second arbitration to settle by B. and C. who were the real parties in the suit; no attachment can issue against B. for not obeying the award made by the second arbitration, because the reference should be made by the parties on the record, and if even it had, there should have been another rule to make the second submission a rule of court. *Owen v. Hurd*, 2 T. R. 643.

If wrong, not cured by consent.

And as the court had no jurisdiction in this case, they could not go into the merits, though B. consented to waive the objection. *Ibid*.

What admitted by a submission.

A submission to arbitration by an administrator is not an admission of assets. *Pearson v. Henry*, 5 D. & E. 6. Notwithstanding the case of *Barry v. Rusb*, 1 D. & E. 691. may seem to throw some doubt upon the point.

How far it is a stay of proceeding.

A submission to arbitration is not a stay of proceedings in any action, unless expressly mentioned as part of the agreement. *Ld. Ray*, 789.

When it must be made a rule of court.

Though a submission must be made a rule of court before any motion be made to enforce the award, yet it need not be made such rule before the award is made; it is only to give jurisdiction to the court, not to the arbitrators.

(D. 2)

(D. 2) Of the Revocation or Countermand.

Submission may be countermanded, but the bond is forfeited.

If A. enters into a bond to B. conditioned to stand to the award of C., yet A. may countermand the submission to the arbitration of C. because the submission being a man's own act, is of its own nature revocable. But then by such countermand, or revocation of the power of the arbitrator, the obligee shall take the benefit of the bond, because the obligor has not stood to the arbitration, &c. since he has countermanded the authority of the arbitrator, and because the obligor has, by his own act, made the condition of the bond (which was for his own benefit to save him from the penalty) impossible to be performed, and by consequence his bond is become single, and without the benefit of a condition. *Vide Vynior's case*, 8 Co. 82.

Nor can it be countermanded if a rule of court.

But if such submission be made a rule of court according to the statute, then the party can never revoke it.

Of the punishment for any breach of the rule.

So if it be by rule of court originally; and if either party are guilty of a breach of the rule, as by filing a bill in equity when it was part of the agreement not to do it, court will grant an attachment. 3 Burr. 1256.

What will be an implied breach.

So if he prevents the arbitrators proceeding, as by serving one of them with a *subpoena* at the time, or the like, it will be construed a breach of the rule. 1 Salk. 73.

(D. 3) Of

(D. 3) Of enlarging the Time for making the Award. (D. 3)

If the award cannot be made by the day fixed upon, the time for making it must be enlarged, otherwise the award itself would be nugatory.

This must be done by motion in court, and by giving a brief to another counsel to consent to such motion; for the court cannot enlarge the time without the consent of both parties.

How to get the time enlarged: must be by consent.

On motion to set aside an award because it was made out of time, it was argued that the parties had by their attorneys consented in writing, *after* the time had elapsed, to give a further time for the making of the award.

Of the operation of the consent of the parties to enlarge.

The court said that such consent might still be made a rule of court, and have a retrospective operation so as make the award good. Mich. Term, 36 Geo. 3.

Before any rule to enlarge the time can be made, the submission or order of *nisi prius* as the case is, must be made a rule of court.

What necessary before such motion is made.

(D. 4) Of the double Remedy by Action or Attachment. (D. 4)

It has been already observed, that whenever the court cannot exercise a summary jurisdiction, as in all cases where there is no action depending, and the submission is not within the statute of William, or where it is a submission within the statute, but not made a rule of court, the party can *only* proceed by action; but even where there is a rule of court, still the remedy by action is not taken away, but the party has his election. He cannot however proceed by action and attachment at the same time. *Stocks v. Huggens*, Easter Term, Ld. Hard. 106.

Double remedy only where submission is made rule of court.

Party cannot pursue both.

Where a cause, in which the defendant has been holden to bail, is referred to arbitration, and the arbitrator awards to the plaintiff a sum exceeding 10*l.*, the defendant may be holden to bail again, in an action upon the award. *Collins v. Powell*, 2 T. R. 756.

Of holding defendant to bail in the action.

(D. 5) Of the Affidavits on moving for an Attachment, and of the Nature of the Attachment. (D. 5)

When there is no action pending, but the submission has been made a rule of court under the statute, the affidavits on which to apply for an attachment for disobeying the award,

Of entering the affidavits.

award, need not be intitled in any cause, but the affidavits in answer must. *Bevan v. Bevan*, 3 D. & E. 601.

But if there is a cause depending, the affidavit ought to be intitled, and if it is not, the court cannot take notice of it though the adverse party is willing to waive the objection. *Owen v. Hurd*, 2 D. & E. 813.

No attachment on affirmation of a Quaker.

An attachment for non-performance of an award cannot be granted on the affirmation of a Quaker: for though it is a suit between party and party, yet an attachment is a criminal prosecution within the proviso of the 6th sec. of 7 & 8 W. 3. c. 34.

Granting attachment discretionary in the courts.

When refused.

The granting an attachment is a discretionary power in the court; in some cases it is refused, as where the defendant was a bankrupt, 1 Str. 695; which is a ground for his discharge, provided he has obtained his certificate, though his bankruptcy happened after he was taken on the attachment. 2 Str. 1152.

So, where there was a contrariety of evidence, the court would not determine it by affidavit, for the plaintiff had his remedy by action on the award. *Hales v. Taylor*, Str. 695.

Q. In case of *feme sole* marrying.

The defendant a *feme sole*, and the plaintiff, agree to a reference. The defendant was awarded to deliver up two notes, and pay a sum of money; she marries and the husband refused to pay: and it was queried, in this case, if the court could grant an attachment against both or either of them? 1 Crom. 265.

When attachment must not be executed.

A party cannot be taken on an attachment upon a Sunday, it being in the nature of a civil execution. *The King v. Myers*, 1 D. & E. 266.

(D. 6)

(D. 6) Of the Reference as to Costs.

Power of arbitrator as to costs.

If nothing is said about costs in the reference, it is in the discretion of the arbitrator to award them or not; for the power of awarding costs is necessarily consequent to the authority conferred upon the arbitrator; but when it is expressed that *the costs are to abide the event*, it is not in the power of the arbitrator to prevent the party in whose favour the award is from having costs; for this reason the above provision is often inserted. And such costs are *legal* costs, that is, such as the law would give in case a verdict had been in favour of the party; so that if the award be only to pay 5*s.* for an assault, the costs can only be 5*s.* *Swinglehurst v. Altham*, 3 D. & E. 138. *Roe dem. Wood v. Doe*, 2 D. & E. 644.

Meaning of costs abiding the event.

But the general term costs in a rule of reference does not include the costs of the reference itself; nor has an arbitrator

for power to give the costs of the award unless under a provision inserted in the order of *nisi prius*. *Bradley v. Tunstowe*, 1 P. & B. 34.

Costs awarded must be taxed as between party and party; they cannot be awarded to be taxed as between attorney and client. *Mardler v. Cox*, Cowp. 127. 2 Blac. 953.

How to be taxed.

Whenever by the award costs are to be paid, such costs are to be taxed by the Master in K. B. and prothonotary in C. B. Str. 737. Barr. 58. 1 Crom. 264.

By whom.

But they are only to be taxed to the time of the reference. 1 Crom. 265. *Tynte v. Every*, Bar. 58.

Up to what time;

At *nisi prius*, a juror was withdrawn, and the cause referred, and the question was, Whether the prothonotary should allow the costs of the reference? and held not. Bar. 123.

and to what extent.

The costs to be paid must be certain, or at least that which can be rendered certain.

Award of costs must be certain, or capable of being rendered so.

An award was, that the one party should pay the other 10*l.* and the costs of a suit now depending in an inferior court, and then to give mutual releases. *Per cur.*—To pay such costs as the Master shall tax, is good; for *id certum est, quod certum reddi potest*. But this is uncertain, and carries it farther than has hitherto been allowed. 1 Crom. 265.

When a cause comes on to trial, and goes off upon a reference to arbitrators; and if the arbitrators never make an award, the cause may be carried down a second time, and if the plaintiff prevails and obtains a verdict, costs shall be allowed. *Burchall v. Bellamy*, Burr. 2693.

Of costs, where cause is referred and again goes to trial for want of an award.

(D. 7) Of impeaching and setting aside the Award.

(D. 7)

To render an award legal and effectual, it should be made agreeable to the submission of the parties, it should not extend beyond it neither to any *matter* not included in it, nor to any *person* not a party to it, nor should it be only *parcel* of the things submitted. It should award nothing *contrary* to law, nor any thing *impossible* to be done, but should be reasonable and *certain*. It ought also to be mutual and *final*. Various are the *legal* objections therefore which may arise as grounds of impeaching an award, all of which must appear upon the *face* of the award itself. They may be taken therefore at any time, either by way of defence to any action brought upon the award, or in shewing cause against an attachment, or by way of motion to set aside the award; provided in the last case the submission has been made a rule of court.

Requisites to make an award legal.

Objections on the face of award when to be made.

But

Other objections de-
hors the
award.

When they
must be made.

Within next
term after
making the
award by stat.
9 & 10. W. 3.

The extent of
the statute.

Not to refer-
ences at nisi
prius.

To other cases
than those of
corruption, &c.

Corruption
must be mani-
fest.

So must misbe-
haviour.

But objections frequently arise to an award which do not appear upon the award itself, and which therefore can only be brought before the court by affidavit, such as the misconduct of the arbitrators, from motives of corruption or partiality, or some irregularity in the conduct of the parties themselves, or their attornies, or the like. In which case the time for impeaching the award is limited to the next term after the making of the award, by stat. 9 & 10 W. 3. c. 15. s. 2. which enacts that—

“ Any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void, and of none effect, and accordingly be set aside by any court of law or equity. So as a complaint of such corruption or undue practice be made in the court where the rule is made, for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made, and published to the parties.”

The true construction of this act of parliament is, that if a motion be made to set aside an award for extrinsic matter, it must be made within the time limited by the act, namely, before the end of the next term; but when the award is bad upon the face of it, the objection may be taken at any time whenever the adverse party endeavours to enforce it, either by action or by attachment. *Pedley v. Goddard*, 7 D. & E. 78.

Every ground of relief in equity against an award is equally open in this court, upon motion in a summary way to set it aside. 3 Burr. 1259.

But the above clause in the statute 9 & 10 W. 3. does not extend to awards made in pursuance of an order of *nisi prius*, but only where the submission is by obligation. *Anderson v. Coxeter*, Str. 301.

It is not however confined to cases of corruption or undue means used by the arbitrators, for when it was moved that an award be referred back to the same arbitration, to reconsider it on the ground that he had not sufficient materials before him at that time, the court held it to be within the statute, and nothing was taken by the action because made too late. *Zachary v. Shepherd*, 2 D. & E. 781.

The court on such motion will never enter into the merits of the original cause of complaint, nor will they set aside an award on the ground of corruption in the arbitrators, unless such corruption is manifest. Str. 301. Burr. 701.

Nor on the ground of misbehaviour in an umpire for receiving evidence from the arbitrators without examining the witnesses, unless he were required to re-examine them, before the making of his award. *Hall v. Lawrence*, 4 D. & E. 589.

A party

A party cannot, in shewing cause against an attachment for not performing an award, impeach the award for defects not appearing on it. But he must obtain a rule for that purpose within the time limited by the above act of parliament. *Holland v. Brooks*, 6 D. & E. 161. But if the defects appear on the face of the award, he may resist the attachment at any time. *Pedley v. Goddard*, 7 D. & E. 73.

What objections may be made in shewing cause against attachment.

SECTION II.

Of Audita Querela.

Formerly when either party had good cause to shew, why a judgment or execution awarded, or likely to be awarded, ought not to be enforced, as if since the judgment a release had been given, or the like; the only mode of proceeding was by *audita querela*. A remedial writ invented to prevent a defect of justice, where a party had a good defence, but by the ordinary forms of law had no opportunity to make it. But now from the indulgence shewn by the courts in granting summary relief upon motion, the action of *audita querela* is rendered obsolete. At the same time a brief account of the proceedings may not be useless to the student, if only to satisfy the curiosity, and to shew the great advantage resulting to suitors, from that latitude of equitable jurisdiction, by motion of which courts of law now assume.

For the cases in which an *audita querela* would lie, and by or against whom it should be brought, we refer the reader to Bacon's Abridgments, tit. *Audita Querela*, and shall content ourselves with giving a short account of the proceedings in the action.

Of the Nature of the Action, and whence the Writ issues.

An *audita querela* is an action, in the nature of a bill in equity, to be relieved against oppression. It lies to relieve the defendant, or in some cases the bail in the action. It must be a matter which the party could not have pleaded before. 1 Wils. 98. The writ, after stating that the complaint of the defendant having been heard, *audita querela defendantis*, and after setting out the matter of the complaint, enjoins the court to call the parties before them; and, having heard the allegations and proofs, to cause justice to be done between them.

An

Out of what
court the writ
issues.

An *audita querela* shall be granted out of the court where the record upon which it is founded remains, or returnable in the same court. F. N. B. 105. b.

And therefore, if a man recovers in B. R. or C. B., the defendant having a release after judgment and before execution, shall sue the *audita querela* out of B. R. or C. B. where the record is. *Ibid.*

And if a recognizance is acknowledged, and there is a release of it, and then execution be sued on it, the party to be relieved shall sue his *audita querela* out of the same court. *Ibid.*

And such *audita querela* out of the rolls of the same court is judicial. *Ibid.*

But it may be original, and the party may sue it out of Chancery returnable in the court where the record remains. *Ibid.*

But it cannot be granted out of any court, returnable in the same court, where the record upon which it is founded is not there. *Ibid.*

The writ of *audita querela* shall be allowed only in open court. 1 Bull. 140. 2 Bull. 97. 2 Show. 240. And on motion, by Trin. 9 Jac. 1. And therefore, when the curfitor has written the writ, an *allocatur* shall be indorsed by the *secundary* in court.

So, if it be irregularly granted, a *vacat.* shall be entered upon the record. Mo. 354.

In an *audita querela* by two, the death of one shall not abate the writ, for the survivor is not to be restored to any thing he has lost, but to discharge himself of the execution; and thereupon, notwithstanding the death of the other, he may proceed for a discharge *in toto* for himself. Vent. 34. 3 Mod. 249.

Of the Bail in Audita Querela.

If the party applying for the *audita querela* is in actual custody, either upon an arrest in an action on the judgment, or in execution; his first object is of course to obtain his discharge, which is by putting in bail to the action of *audita querela*.

He must procure four persons to be bail for him: the bail-piece is in the following form:

Easter Term, in the twentieth year of King George the Third.

" To wit, C. D. of, &c. is delivered on bail to prosecute, with effect, a writ of *audita querela* brought by him

" to be discharged of and from a judgment given against him in the court of our lord the king, *before the king himself*, at the suit of one A. B., for five hundred pounds of debt, and for damages, costs, and charges, to

" E. F. of, &c.

" G. H. of, &c.

" N. O. attorney. " I. K. of, &c.

and

" L. M. of," &c.

The condition of the recognizance :

" You severally acknowledge yourselves to owe A. B. the sum of one thousand pounds—

" Upon condition that the said C. D. shall prosecute his suit with effect, and if he shall be convicted or make default in the premises, that he shall pay the condemnation-money, or you shall do it for him.

" Are you content?"

In all cases it is usual, that the plaintiff in an *audita querela* be bailed, if he shews matter in writing for his discharge, and the defendant be demanded whether he can gainsay it.

1 Roll. 133. 384. 2 Roll. 113. 1. 5.

If the plaintiff in *audita querela* has a release, or other writing upon which his *audita querela* is founded, the same must be proved in court by the witnesses thereto, before the writ of *audita querela* can be allowed, or a *superfedeas* granted.

1 Sid. 351. Salk. 92.

And then, after proof of such release, &c. and allowance of the writ, if he be not in *execution*, he may be bailed by the court, and on motion may have a *superfedeas*. Com. Dig. 1 vol. 489. Salk. 92.

But if the plaintiff in *audita querela* be in *execution*, he cannot be bailed till the defendant plead to the *audita querela*. Comp. Att. 214.

But where an *infant* was taken in *execution*, and brought an *audita querela*, he was discharged on clearly proving his infancy. Carth. 278.

An *audita querela* is no *superfedeas* of itself, and therefore execution may be taken out unless a *superfedeas* be actually sued upon the allowance of the writ of *audita querela*. Salk. 92.

If the first writ of *audita querela* abate, upon a second purchased, he may have another *superfedeas*. F. N. B. 104. a.

Of the Procefs.

The *audita querela* having been granted, the next thing is the process thereon, which differs according to the subject-matter

matter of it, and also whether the party applying for it be in execution or not.

If an *audita querela* be founded on record, or the party be in custody, the process upon the *audita querela*, when allowed, is a *scire facias*. But if the *audita querela* is grounded on a matter of fact, or the party be not in custody, but only brought *quia timet*, the process on the *audita querela*, when allowed, &c. is a *venire facias*; and on default thereto, a *distingas ad infinitum*. Salk. 92.

If brought by one in execution, the *scire facias* is the process. Carth. 303.

If the original suit were by *original writ*, there should be fifteen days at least between the *teste* and *return* of the process issued upon the allowance of the *audita querela*, and must be returnable on a *general return*.

But if the original suit were by *bill* (it seems), that fifteen days between the *teste* of the first *scire facias*, and *return* of the second *scire facias* are sufficient, i. e. seven days between the *teste* and *return* of each writ, and not one ten, and the other five.

And the writ should be returnable on a day certain in term.

But even if the original suit were by *bill*, and the process on the *audita querela* be a *venire facias*, I should apprehend that there ought to be fifteen days between the *teste* and *return* of that writ; because the second process, issuing upon default thereto, is a *distingas*.

The defendant in the *audita querela* should be warned to appear.

A. being taken in execution, brought an *audita querela*, tested the 21st Nov. a *scire facias* issued and bore *teste* the 6th Nov. The defendant appeared and demurred, and shewed for cause, that the *teste* of the *scire facias* was before the *audita querela*. *Sed non allocatur*, for here the *scire facias* being but to compel the party to appear, and answer the *audita querela*, the appearance has helped the defect of the process; but upon a *scire facias* upon a judgment it may be otherwise, because another judgment is to be grounded upon it. *Vaughan v. Lloyd*, Hil. 20 & 21 Car. 2.

Of the Declaration, &c.

If the defendant in *audita querela* appears upon the *scire facias*, *venire facias*, or *distingas*, the plaintiff in *audita querela* declares; in which declaration the whole writ of *audita querela* is recited in the same manner as in a declaration in *scire facias*, with a beginning to this effect:

" Our lord the king sent to his justices (a), *assigned to hold pleas before the king himself*, his writ close in these words, " to wit, George the Third," &c. (and to recite the whole writ of *audita querela*).

In the declaration in an *audita querela*, the better form is to recite the whole record of the recovery, or it may be recited generally, as "*Quod cum quidam A. nuper, scilicet, &c. implacitasset quendam B. &c. super quo he found bail, taliter que in eadem curia nostra processum fuit, quod predictus A. recuperet*," &c. Co. Ent. 87. b. c.

But if there is a variance between the *audita querela* and the record, the writ abates. F. N. B. 104. r.

The declaration ought to comprehend only one *gravamen*, or at least, if it mentions several, it ought to rely upon one only, otherwise it will be double. F. N. B. 104. r. Cro. Eliz. 809. Dy. 297. b. And the plaintiff ought to shew himself aggrieved. *Ibid.*

In the entry of the declaration, after the writ of *audita querela* is set forth, the plaintiff suggests the *gravamen*, and prays to be discharged, &c. Afterwards is set out the award of the *scire facias* or *venire*, &c. and the recognizance of bail, (if the plaintiff was in execution and delivered on bail,) then the return to the *scire facias* or *venire*, and the defendant's appearance.

If the defendant confesses the matter alleged, the plaintiff has judgment and discharge by confession; but if the defendant denies it, the parties proceed to issue in fact, or in law, as in other cases.

No damages or costs can be given to a plaintiff in an *audita querela*. Dyer, 194.

If the plaintiff in *audita querela* be nonsuited, though he may have a new writ of *audita querela*, he shall have no *superseas* to stay execution.

If the *audita querela* be brought while the money recovered on the first judgment remains in the hands of the sheriff, and not paid over to the party, the court will make an order for it to remain there till the *audita querela* is determined. But it seems, that if the money on the first judgment is paid over to the party recovering it, there is no remedy for it.

But by Windham, Just. Where judgment is had in an *audita querela* brought before the former execution done, the plaintiff in *audita querela* shall be restored to whatever he lost

(a) This is the form of beginning in B. R. In C. B. the form is thus, " OUR lord the king sent to his justices of the Bench," &c.

by the execution, which the court agreed, being founded on a release. 1 Keb. 245. 260. 1 Sid. 74.

Of the Judgment.

By the process of *venire facias*, the plaintiff in *audita querela* may have distress infinite till the defendant appears. But if the defendant does appear and plead after a *scire facias*, and two *nihil*s returned, there shall be judgment against him.

But if there is judgment after one *nihil*, it is error. R. Yelv. 88.

If the defendant pleads, and afterwards makes default upon the *scire facias ad audiendum judicium*, there shall be judgment against him.

If there be judgment for the defendant in an *audita querela*, before he have execution upon his first judgment, he may afterwards pursue his execution upon that. 1 Vent. 264.

If the defendant in the first judgment was in execution before the *audita querela*, and in that there is judgment for the defendant, he shall pursue judgment in the *audita querela*. 1 Vent. 264.

SECTION III.

Of the Habeas Corpus.

Habeas corpus, what.

An *habeas corpus* is a writ for bringing the body of any person who is imprisoned before the court *cum causâ detentionis*, and is the proper remedy whenever any one is restrained of his liberty by being confined either in a common gaol or in a private prison, whether it be for a criminal or civil cause, in order that his body and cause may be removed to some superior jurisdiction which hath authority to examine the legality of such commitment, and on the return of the writ either to bail, discharge, or remand the prisoner. Vaugh. 136.

Of the writs of habeas corpus used in criminal cases.

The writs of *habeas corpus* used only in criminal cases, are the *habeas corpus ad subjiciendum*, regulated by the *habeas corpus* act 31 Geo. 2. and justly deemed the bulwark of British liberty; and *habeas corpus ad deliberandum et recipiendum*, which is to remove a criminal to the proper place where he committed an offence, to take his trial there.

Of the writs used in civil cases.

But it is not the object of the present work to treat of criminal proceedings; such writs of *habeas corpus* only as are

are used in civil cases will be here noticed, which are the following :

- (A) The *Habeas Corpus ad respondendum*.
- (B) The *Habeas Corpus ad testificandum*.
- (C) The *Habeas Corpus ad satisfaciendum*.
- (D) The *Habeas Corpus ad faciendum et recipiendum*.

(A) The *Habeas Corpus ad respondendum*.

(A)

There are particular prisons belonging to the particular courts, as the Marshalsea or King's Bench prison to the court of King's Bench, the Fleet to the court of Common Pleas, and the like ; whenever therefore any person is imprisoned by legal process, he is sent to that prison appropriated to the court whence the process issued. Being once imprisoned there, he cannot be sued in any other court, unless he is first removed into the custody of such court, and brought up to answer there. This is done by an *habeas corpus ad respondendum*, which is a writ to remove a person out of the custody of one court into that of another in order that he may be sued, and answer the action in the latter. Also where a person is in custody in an inferior jurisdiction, the plaintiff may bring his *habeas corpus ad respondendum* returnable in a court above, in order to remove the prisoner and charge him with an action there.

Intent and meaning thereof,

as to bringing up defendant from prison of inferior court.

But no person in custody of an inferior court can be removed by this writ to be charged in a new action by the same person who is plaintiff in the court below, and for the same cause of action for which the defendant is already in custody. *Melrose v. Gardner*, Cow. 116.

Not to be used by same plaintiff for same cause of action.

So, if the defendant, a prisoner, removes himself into the prison of another court *before* declaration, and plaintiff wishes to declare against him in the court where he was originally charged, he must bring him back by this writ of *habeas corpus ad respondendum* before he can declare.

How used when defendant removes before declaration.

But if he so removes himself *after* declaration, this writ is not wanted ; but plaintiff may proceed to judgment as if he had not been removed, and then bring him back by *habeas corpus ad satisfaciendum* to charge him in execution. See *ante*, Ch. xv. Sec. iii. (F).

Otherwise if removed after declaration.

This writ may also be used in *term* time by the defendant, a prisoner, to remove himself to another prison ; upon which he must be charged in court with a declaration in a bailable action ; but if he wishes to remove himself in vacation, he

How to remove defendant in term time ;

must do it by writ of *habeas corpus cum causa*, as hereinafter described, (D).

or to charge him with a new action in vacation;

but now the practice is otherwise.

Another use formerly made of this was to charge a prisoner with a new action in vacation time, for which purpose an *habeas corpus ad respondendum* was sued out tested the last day of the preceding term, and returnable the first of the next term; but this practice is now abolished, and prisoners are charged in vacation by a bill and declaration as of the preceding term.

The form of this writ is as follows:

Habeas corpus ad respondendum to remove a person from the Fleet to K. B.

"GEORGE the Third, &c.—To the warden of our prison of the Fleet, greeting: We command you that the body of A. B. esq. in our prison under your custody, as it is said, detained under a safe and secure conduct, together with the day and cause of his caption and detention, by whatsoever name the same A. B. may be called in the same, you have before us at *Westminster*, on day next after to answer to C. D. in a plea of trespass, and also to a bill of him the said C. D. against the said A. B. for 50*l.* upon promises according to the custom of our court, before us to be exhibited, and to do and receive all and every thing which our same court before us shall then and there consider concerning him in this behalf; and have there then this writ. Witness *Lloyd Lord Kenyon*, at," &c.

This writ good cause of detainer.

An *habeas corpus ad respondendum* may be granted to the warden of the Fleet, or keeper of an inferior prison of a liberty or franchise, returnable at a day certain in court, and is a good cause of detainer, as well as where a *capias ad respondendum* comes to a sheriff. Rules and Orders in K. B. 57.

What time the court shall retain defendant upon this writ, if a second writ issues.

If one prisoner in the Counter be removed into the King's Bench by *habeas corpus ad respondendum*, and intending to go over to the Fleet, procures some friend to bring a *habeas corpus* to bring him thither; he shall not be removed thither till he has answered to the cause here, and he shall not compel the plaintiff to follow after a proling defendant, and so *vice versa* of the Common Pleas; each court shall retain the defendant, in which he is first attached, and after he has answered there, you may carry him where you will. This is fit to be the settled course, if there be any difference between the two courts. Salk. 350.

Must always be detained two days at least.

And at all events such prisoner must remain two days after such commitment in custody of the marshal, notwithstanding any other writ of *habeas corpus*. R. 5 W. & M.

(B) Of

(B) Of the *Habeas Corpus ad testificandum*.

(B)

This writ issues when a person is in custody whose evidence is material at any trial. It is directed to the marshal, warden, sheriff, or gaoler in whose custody he is, commanding him to bring such person before the court where the cause is to be tried, to give testimony on the part of the person who sues it out. For the mode of obtaining it, and what persons may be brought up by it, see Ch. ix. Sec. ix.

Use of habeas corpus ad testificandum.

The form is as follows :

" *GEORGE* the Third, &c.—To W. J. esq. being marshal of our Marshalsea before us, greeting : We command you that the body of D. D. in our prison, under your custody, as it is said, detained under a safe and secure conduct, by whatsoever name the said D. may be called in the same, you have before our trusty and well-beloved *Lloyd Lord Kenyon*, our chief justice assigned to hold pleas in our court, before us at *Westminster*, in his great hall of pleas there, on Thursday the day of this month of at eight o'clock in the forenoon of the same day, there to testify the truth of his knowledge in a certain cause, in our court before us now depending, and then and there to be tried between A. B. plaintiff and C. D. defendant, in a plea of trespass on the case, and then immediately after the said D. D. shall then and there have given his testimony before the said chief justice, to return him the said D. D. to our same prison, under safe and secure conduct ; and have there then this writ. Witness," &c.

Habeas corpus ad testificandum.

(C) Of the *Habeas Corpus ad satisfaciendum*.

(C)

The *habeas corpus ad satisfaciendum* issues to bring a prisoner from the prison of one court into that of another, in order to charge him in execution upon a judgment of the last court.

Intent and use thereof.

It is always necessary when a prisoner, after declaration in K. B. removes himself to the Fleet, or, *vice versa*, after declaration in C. B. removes himself to the King's Bench, in which he cannot be charged in execution, because the proceedings and judgment are in another court ; he must therefore be brought back to the court from whence he was so removed by this writ.

When necessary.

See proceedings against prisoners, Ch. xiii. Sec. lii.

Prepare præcipe ; fill up writ ; get it signed ; carry it to the marshal or warden where defendant is prisoner. It must be returnable on a day out. How to sue it certain.

certain. On the return day, he is brought up, and one of the judge's clerks, upon application, will make out commitment. Pay fee for the return, and bringing up.

The judge's clerk takes the habeas corpus into court with defendant, and the Master in K. B. or secondary in C. B. commits him.

In K. B.

There is a duplicate of the writ, on which the Master marks the commitment, and delivers it to tipstaff, who carries prisoner over to King's Bench prison. Imp. K. B.

In C. B.

Have the roll in court; secondary marks thereon the habeas corpus, and commitment by the court in the margin of the judgment. R. M. 1654, Imp. C. B.

The writ itself is carried into court and filed of record.

To whom granted, how cause of detainer, &c.

An *habeas corpus ad satisfaciendum* may be granted to the warden of the Fleet, or to such inferior gaoler, returnable in court at a day certain, and the number roll of the judgment to be indorsed upon the writ by the attorney who sues it out; and such writ to be a cause of detainer. Rules and Orders, K. B. 57.

The form of this writ is as follows:

Habeas corpus ad satisfaciendum in case.

"GEORGE the Third.—To the warden of our prison of the Fleet, greeting: We command you that you have before us at *Westminster*, on next after the body of G. H. under safe and secure conduct detained in our prison, under your custody, as we are informed, together with the day and cause of his being taken and detained, by whatsoever name the said G. H. is there known, to satisfy T. S. 30^l. which the said T. S. lately in our court before us at *Westminster* recovered against the said G. H. for his damage which he sustained, as well by reason of the not performing certain promises and undertakings lately made by the said G. to the said T. at *Westminster* in the county of *Middlesex*, as for his costs and charges by him laid out about his suit in that behalf, whereof the said G. is convicted, as appears to us of record, and further to do and receive what our said court before us shall then and there consider of him in this behalf; and have there then this writ. Witness *Lloyd Lord Kenyon*," &c.

(D)

(D) Of the *Habeas Corpus ad faciendum et recipiendum*.

Meaning and use thereof.

The writ of *habeas corpus*, which in this place it will be necessary chiefly to enlarge upon, is that of the *habeas corpus faciendum et recipiendum*. It issues only in civil cases where a person is sued and in gaol, and is desirous of being removed to some other gaol, or where he is in the prison of an inferior court

court for a cause of action arising within their jurisdiction, and wishes to have the cause brought up to and determined by a superior court. It is usually called an *habeas corpus cum causa*.

Called *habeas corpus cum causa*.

This writ is granted at all times of common right, without any motion in court upon the delivery thereof to the officer, or court below; it instantly supercedes all the proceedings therein.

When grantable.

It may be called the bulwark of our liberty; but it is superior to every other writ of the kind, the *habeas corpus ad subjiciendum* being grantable only in term time upon motion by leave of the court. 2 Mod. 306. 1 Lev. 1.

Formerly, by rule of court, Mich. 1654, this writ could not issue in vacation, nor be made returnable *immediately*, unless the sheriff or officer, or inferior court to whom it was directed, was within five miles of London; but in such case it was to be made returnable at a day certain in court.

May issue in term or vacation.

But that rule has been declared obsolete; and this writ of *habeas corpus*, though directed to a gaoler, &c. of any distant county, may be made returnable before a judge, and *immediate*; which means within due and convenient time. Dr. *Bettesworth v. Bell*, Burr. 1875.

When returnable.

The writ of *habeas corpus*, being a prerogative writ, lies by the common law to any part of the king's dominions, for he ought to have an account why any of his subjects are imprisoned. 1 Rol. Abr. 69. Cro. Jac. 543. It lies to Jersey and Guernsey, Vent. 347. Sid. 386.; to Berwick and to counties palatine, Latch, 160. 3 Keb. 279.; and to the marches of Wales, as it does to all other courts which derive their authority from the king, as all the courts exercising jurisdiction within his dominions do; and that it being a prerogative writ, does not come within the rule *brevia domini regis non currunt*, &c. for that must be understood of writs between party and party. 2 Rol. Abr. 69. *Wetherley v. Wetherley*.

To what places it lies.

But an *habeas corpus ad faciendum et recipiendum* does not lie to the cinque ports at the suit of the subject. *Vide* Bac. Abr. and authorities there cited, 3 vol. 4.

The form of the writ is as follows:

"GEORGE the Third, &c.—To the [describe the sheriff, judge, or steward of the court to which it is directed properly] greeting: We command you that you have the body of W. W. detained in your prison under your custody, as it is said, by whatsoever name he may be called in the same, together with the day and the cause of the taking and detaining the said W. W. before our right trusty and well-

Habeas corpus ad faciendum et recipiendum.

“ beloved *Lloyd Lord Kenyon*, our chief justice assigned to
 “ hold pleas in our court before us, (or if in C. B. before Sir
 “ *James Eyre*, knight, our chief justice of the bench,) at his
 “ chambers, situate at Serjeants-Inn in Chancery-lane, (or
 “ if it be returnable in term, make it returnable at a day
 “ certain,) immediately after the receipt of this our writ, to
 “ do and receive all and singular those things which our said
 “ chief justice shall then and there consider of him in this
 “ behalf; and have there then this writ. Witness *Lloyd*
 “ *Lord Kenyon*,” &c.

We will consider the several uses of this writ:—

(D. 1) In removing a Prisoner from one Gaol to another.

(D. 2) In bringing up a Prisoner for the Purpose of his being surrendered in Discharge of his Bail.

(D. 3) In removing a Cause from an inferior to a superior Court.

(D. 1) (D. 1) Of the *Habeas Corpus* for removing a Prisoner from one Gaol to another.

How if defend-
 ant wishes to
 remove to
 King's Bench
 or Fleet, from a
 prison of infe-
 rior court;
 or in custody of
 sheriff.

If the defendant is a prisoner in any inferior court upon any cause of action there, and he wishes to be removed to the King's Bench prison or Fleet, he may, in the first instance, sue out this writ, which removes the body with the cause, as will be presently more fully shewn, *post*, (D. 3).

If he be in custody of the sheriff upon process out of K. B. or C. B. by suing out this writ, directed to such sheriff, his officer must bring up the defendant before the judge, who will commit him to the Marshalsea or Fleet, as the action may be.

How if defend-
 ant wants to be
 removed from
 K. B. to Fleet,
 or vice versa:

If the defendant be in custody of a sheriff upon process from the Common Pleas, and is desirous of being carried to the King's Bench prison, or *vice versa*, he must first get some other creditor to make affidavit of a debt above 10*l.* to issue out a new writ thereon, and to leave it with a *habeas corpus* at the proper sheriff's office; upon the return of which, the sheriff's officer takes the defendant before some judge of the court whence such last writ issued, who will commit him to the proper prison of the court.

used also by
 plaintiff to re-
 move defend-
 ant.

Necessity there-
 of in some cases

This also is the writ for the plaintiff in the action to remove defendant from the custody of the sheriff into the prison of the court.

Formerly when a defendant was in custody of sheriff on mesne process, for want of bail the plaintiff was obliged to sue

sue out this writ, and have him committed before he could declare against him; and if he did not remove him within two terms from the arrest, defendant was entitled to his discharge. But by the statute of 4 & 5 W. & M. plaintiff may now declare against defendant whilst in custody of the sheriff. See *ante*, Ch. xv. Sec. iii.

suspended by 4
and 5 W. & M.

This statute was only intended in case of plaintiffs, and not to take away the common law remedy, so that still they may sue out this *habeas corpus*, and at any time remove defendant from custody of sheriff into the prison of the court, either before or after declaration. Dr. *Bettesworth v. Bell*, 3 Burr. 1875.

Intent of that
statute.

Get blank writ at stationer's; fill it up; get it signed and sealed; take it to proper sheriff's office, in whose custody defendant is; he will make his return, and give warrant to his officer to bring the prisoner up before one of the judges of the court to be committed.

How sued out.

Any judge of the court may commit him, though writ is returnable before the chief justice

The warden or marshal must obey the *habeas corpus*, though the party refuses to pay his fees, for he has a remedy for them. *Hopman v. Barber*, 2 Str. 814. But the judge, when the prisoner is brought up, will not make an order for him to be turned over till the fees are paid. Str. 308.

Must be obeyed
by officer, tho'
fees not paid.

One shilling per mile is the usual charge for bringing defendant from a country gaol.

Fees of the
officer.

When defendant is committed, he must stay two days at least in the custody of the gaoler to whom he is committed, notwithstanding any other writ of *habeas corpus* sued out. R. Mich. 1654.

Must stay two
days at least in
custody on the
writ.

(D. 2) Of removing Prisoners to surrender in Discharge of Bail.

(D. 2)

When defendant is in custody of any sheriff at the suit of another, or otherwise, and his bail wish to surrender him, they may have this writ of *habeas corpus* for that purpose.

How to proceed therein, see Vol. I. Ch. iv. Sec. vi.

(D. 3) Of the *Habeas Corpus* to remove a Cause from an inferior Court.

(D. 3)

(D. 3. a) *What Causes may be removed, and when.*

(D. 3. b) *Of the Operation of the Habeas Corpus.*

(D. 3. c) *Of the Return thereto.*

(D. 3. d) *Of Bail on Habeas Corpus.*

(D. 3. e)

(D. 3. e) *Of Declaring, Pleading, &c.*(D. 3. f) *Of the Procedendo.*

(D. 3. a)

(D. 3. a) *What Causes may be removed, and when.*

Of statute 21
Jac. 1. limiting
the action to, 51.

By 21 Jac. 1. c. 23. s. 4. it is enacted, "That if any action or suit not concerning any freehold or inheritance, or title of lands, lease, or rent, be commenced or depending in such inferior court of record, it shall appear or be laid in the declaration, that the debt, damages, or things demanded, do not exceed 5 *l.* then such action or suit shall not be stayed by any writ whatsoever, other than writ of error or attain.

To what courts
it extends.

And by sec. 6. it is provided, "That this act shall extend only to such inferior courts of record, and for so long time only as there shall be an *utter barrister of three years standing at the bar of the four inns of court*, steward or under-steward, town-clerk, judge, or recorder of such inferior court, or assistant to the judge or judges of the same, as shall not be an *utter barrister of that standing*, and there present, and not of counsel in any action or suit there depending."

Barrister must
be present.

Such barrister must at all events be present at the trial, otherwise the trial will be void, and the cause be removed by *habeas corpus*. *Fanley v. Mr. Connell*, Burr. 515.

How above sta-
tute was evaded.

In order to evade the above statute, it was usual for defendants when the real cause of action was under 5 *l.* to set up a fictitious action against themselves of a pretended demand of above that sum, and then bring an *habeas corpus* thereon, by which writ all causes against them in the court below were removed, and therefore of course the smaller action, to the prejudice of many poor plaintiffs, who for want of means to carry on a suit in the superior court, were obliged often to desist from prosecuting, and submit to the loss of their demands.

Afterwards re-
medied by 12
Geo. 1. c. 29.

But by 12 Geo. 1. c. 29. s. 3. to prevent such practices in future; it is enacted, "That the judges of such inferior courts of record, as are described in the statute of Jac. 1., may proceed in such actions commenced, as are therein specified, which appear or are laid not to exceed the sum of 5 *l.* although there may be other actions against such defendant, wherein the plaintiff's demands may exceed the sum of 5 *l.*"

How the law
now stands.

So that now the cause of action must be above 5 *l.* to be removed.

What actions
are not remove-
able.

No action can be removed, which is only maintainable in the court below, as being founded upon any special custom of the place,

place. Such as against a *feme covert* as sole trader, brought in the mayor's court upon the custom of London. *Pope v. Vaux & Un.*, 2 Blac. 1060.

Or an action there for calling a woman a whore. *Watson v. Clerk*, Car. 75.

If therefore a *habeas corpus* issue, the court, upon such special matter being shewn in the return, will grant a *procedendo*, lest plaintiff should otherwise lose her action.

At common law there was no particular limitation as to the time when a cause might be removed. The consequence was, that many abused this privilege; for a defendant might secretly sue out a writ of *habeas corpus*, keep it in his pocket till issue was joined, the jury sworn, and the plaintiff had actually given his evidence; and then produce the writ and supersede all further proceedings; by which means he knew the strength or weakness of his adversary's case, and had an opportunity of preparing his defence accordingly, when the cause came to be tried in the court above.

Of the time of removing the cause.

But to prevent this abuse the 43 Eliz. c. 5. enacts, "That no writ of *habeas corpus*, or other writ sued forth by any person whatsoever, out of any of her majesty's courts of record at Westminster, to remove any action, suit, plaint, or cause, depending in any inferior courts, having jurisdiction thereof, shall be received or allowed by the judges, or officers of such court, wherein or to whom such writs shall be delivered (but they may proceed therein as if no such writ were sued forth or delivered); except that the said writ or writs be delivered to such judges or officers of the said court, before that the jury which is to try the cause in question, and the party that sued forth the said writ, or for whose benefit it was sued forth, have appeared, and one of the said jury sworn to try the said cause."

How regulated by 43 Eliz. c. 5.

This statute did not however effectually remedy the evil; parties often stayed till the last moment of trial, before the *habeas corpus* was produced, and this harassed the suitors and occasioned unnecessary expence. The legislature again interfered, and by the 21 Jac. 1. c. 23. s. 2. enacted, "That no writ of *habeas corpus*, *certiorari*, or other writ sued forth, to remove any action or suit commenced in any inferior court of record, having jurisdiction thereof, shall be allowed by the steward, judges, or officers thereof, unless delivered before issue or demurrer joined in the said cause so depending, so as the said issue or demurrer be not joined within six weeks next after the arrest or appearance of the defendant to such action or suit."

Defects of that statute.

Remedied by 21 Jac. 1.

The statute 21 Jac. may at first view appear rather contradictory of the statute of Elizabeth, but they are perfectly compatible.

Explanation of the two above statutes.

compatible. If issue or demurrer be joined within six weeks from the arrest or appearance, *habeas corpus* may issue any time before one of the jury is sworn on the trial, according to 43 Eliz. But if the parties wait six weeks before they join in issue or demurrer, no *habeas corpus* can afterwards remove the cause. Besides which, the statute of Elizabeth extends to *all* inferior courts; that of James mentions courts of record.

How where *habeas corpus* issues after interlocutory judgment.

There seems some contradiction in the case of an *habeas corpus* after interlocutory judgment: no notice is taken thereof in either of the statutes. In the case of *Wyatt v. Markham*, Prac. Reg. 217; Bar. 221; it was held too late after interlocutory judgment; but in *Cox v. Hart*, Burr. 759, an *habeas corpus* after interlocutory judgment, but before executing inquiry, was held well, and the practice was said to be to receive such writs any time before one of the jury were sworn.

(D. 3. b)

(D. 3. b) *Of the Operation of the Habeas Corpus.*

How it suspends proceedings in courts below.

The writ of *habeas corpus*, immediately upon being sued, suspends the power of the inferior court; and if they proceed afterwards, the proceedings are void and *coram non jure*; 1 Salk. 352; Cro. Car. 261; 2 Jones, 209; 2 Mod. 195; that is, provided the writ was delivered to the proper officer within the time, according as the case is to be governed by statute of Elizabeth or of James, as above mentioned; otherwise the court may proceed. Bar. 221. *Hornbuckle v. Eaton*.

The writ operates from the delivery, not from the *teste*.

(D. 3. c)

(D. 3. c) *Of the Return to the Writ.*

Return to be made to first writ.

A return must be made to the first writ of *habeas corpus*, or an attachment may issue immediately without any *alias* or *pluries* writ, notwithstanding what may be found in the old books upon the subject. *Per* Buller, J. in *The King v. Winton*, 5 D. & E. 91.

By whom returned.

The writ must be returned by the same person to whom it is directed; and where the writ was awarded to a sheriff, who before the return left his office, and a new sheriff was made, who returned *languidus*, the court held the return not good; but it ought to be returned by the two sheriffs; by the old sheriff that he had the body, and had delivered it to the new sheriff; and then the new sheriff might have returned *languidus*. *Peck v. Cressett*, Pas. 26 Car. 2.

What to be returned.

The record itself is not removed by *habeas corpus* as it is by *certiorari*, but remains below; and the return is only a history of the proceedings. The return, therefore, may be filed,

filed, and afterwards a *procedendo* may issue, because it will not send out any record filed which could not be done, but will only remove the suspension. Salk. 352.

Where an *habeas corpus* is properly sued out, so as to suspend the proceedings, it is sufficient for the party to whom it is directed, to return *generally* the cause for which the party is in custody with the body; but where the *habeas corpus* is irregular, or the court proceeds afterwards, they must return the whole *special matter*.

When return to be general, when special.

Or the person to whom it is directed will be in contempt. Carth. 69.

The declaration itself ought to be returned that the court may see what the cause of action is. If the *habeas corpus* is delivered before the plaintiff has declared, he ought immediately to enter his declaration, that it may be returned upon the writ. *Watson v. Clerk*, Car. 75.

Declaration should be returned.

If the cause of action is under 10 *l.* and defendant does not enter into a recognizance agreeable to 19 Geo. 3. c. 70. which see *post*, (D. 3. d); it is proper matter to be a special return. *Staines v. Grant*, East. 22 Geo. 3. 2 Crom. 402.

If the return be insufficient, court will sometimes allow it to be amended. Carth. 75.

If return insufficient.

The lord mayor, aldermen, and sheriffs of London, moved to amend their return of defendant's writ of *habeas corpus cum causa*. The substance of the return was the action between the said parties in debt for the penalty of a *bye-law* brought against defendant for employing a *foreigner* (no freeman of the city), and the custom to make *bye-laws*; but the custom to employ freemen, and not foreigners, within the city was omitted; which last-mentioned custom it was prayed might be inserted in the return. For defendant it was submitted whether the return was amendable or not, especially as another rule touching the granting of a *procedendo* was pending. But the rule to amend the return was made absolute.—*Harrison, Chamberlain of London, v. Potter, Barnes*, 23.

How for return amendable.

An *habeas corpus cum causa* went to the portreeve of Yeovil in Somersetshire, who returned, *that before the coming of the writ the party was bailed*; and the plaintiff's counsel moved for a better return; and it was ruled, that he should make a better return: for though the body be bailed, he ought to return the cause—and the body cannot be bailed after the writ received. *Salmon v. Slade*, Hil. 25 & 26 Car. 2. 2 Crom. 402.

An *habeas corpus* went to the *stannary* court, to which an insufficient return was made, and therefore disallowed. *Et per cur.* The warden of the *stannaries* must be amerced, and you

Of punishment for insufficient return.

you may go to the coroner's and get it affected, and estreat it; and an *alias habeas corpus* must go for the insufficiency of the return to the first, and upon that the body and cause must be removed up; if another excuse be returned, we will grant an attachment. Salk. 350. pl. 8.

Of the costs.

If defendant sues out *habeas corpus*, and from his own irregularity when the cause is brought up he is remanded, plaintiff will be allowed his costs to be taxed, and to be inserted in the rule to remand him, and gaoler to detain him until the costs be paid. *Staines v. Grant*, 2 Crom. 402.

(D. 3. d)

(D. 3. d) Of Bail on Habeas Corpus.

When required.

By an old rule of court, whenever bail is required in the court below, bail must be put in in the court above, upon removing the cause by *habeas corpus*. R. Hil. 2 Jac. 2.

Before the statute of 19 Geo. 3. c. 70. this rule was very necessary, because persons could at that time be held to bail in actions in an inferior court for 40*l.*, but in the superior courts not under 10*l.* So that unless the above regulation had been made, the defendant by removing the cause, if above 40*l.* but under 10*l.*, might have discharged his bail, and deprived the plaintiff of that security which he had in the court below. But since the passing of that statute the efficacy of the above rule ceases; for now, as no one can be arrested and held to special bail in an *inferior court*, without an affidavit made and filed, that the cause of action amounts to 10*l.* or upwards, which is the same sum for which defendant may be held to bail in the courts above, it cannot be of advantage to the defendant, so far as regards his giving bail, to remove his cause into a superior court.

Of the recognizance below, in case no bail required above.

But although bail above is not required, unless the cause of action amounts to 10*l.*, yet, to discourage the removal of causes merely for delay, which is too often done to harass the plaintiff, the same statute provides, "That no action in
" an inferior court, not amounting to 10*l.* or upwards, shall
" be removed by *habeas corpus*, &c. unless the defendant shall
" enter into a recognizance, with two sureties in the court below,
" in double the sum for which the action is brought, for payment
" of the debt and costs, in case judgment shall pass against
" him."

Bail not to be put in till habeas corpus returned.

No bail to be tendered, or put in upon an *habeas corpus* until the *habeas corpus*, and the cause for which bail is to be put in, be returned, to the end that it may appear for what cause the defendant is detained, and bail may be taken, and the *habeas corpus* and bail duly filed. Mich. 1654. Pas. 29 Car. 2. Hil. 16 W. 3.

Habeas corpus to remove a cause out of an inferior court, and on search, plaintiff's attorney found bail; but the *habeas corpus* not being returned and filed, the bail signified nothing, and therefore he carried the cause back by *procedendo*, of which defendant complained to the court, but it was ruled, that the defendant cannot put in bail till the *habeas corpus* be returned. *Masters v. Bruges*, Mich. 20 Car. 2. Defendant therefore, if he wishes to put in bail, must first apply to the sheriff for a return to *habeas corpus*.

A defendant who has removed a cause from an inferior court into B. R. or C. B. is not of course obliged to put in *special bail* there; but it lies with the plaintiff to compel him so to do. In order, therefore, to get bail to the action, the plaintiff, immediately as he discovers that the cause is removed, should obtain a rule of court, or order from one of the judges of the court, for a *procedendo* to remand the cause, unless good bail be put in within *four days* next after notice of the rule (if in term), or within *six days* next after notice of the rule (if in vacation), and then serve a copy of such rule or order on the defendant or his attorney; and unless bail be put in accordingly, a *procedendo* may be had.

Of compelling defendant to put in bail.

May 20th, 1742, an *habeas corpus*, returnable *immediate*, was lodged at the *palace court*, to remove a plaintiff into C. B., and nothing farther was done in it till the 20th of November, when the plaintiff served the defendant with a rule to put in bail. Defendant insisted, that the plaintiff should have served such rule within *two terms* after the *habeas corpus* brought, and was now too late. But the court held, that if the defendant had put in bail upon the *habeas corpus* without staying to be forwarded by a rule for bail, and the plaintiff had not declared within two terms after bail put in, the cause would then have been out of court; but the rule for bail is not limited to any particular time: accordingly, the rule to shew cause why proceedings should not be stayed, was discharged. *Barnes*, 90.

Within what time plaintiff must do this.

If *common bail* only is necessary, the attorney for the defendant fills up a common bail-piece to the *habeas corpus* and return, and files the same at the judge's chambers on the return of the rule, and gives notice of having filed the same to the plaintiff's attorney.

How to put in bail.

If common bail.

If *special bail* is required, the defendant, upon service of the rule for bail engrosses a bail-piece (a), and annexes the same to the *habeas corpus* and return; and then takes the bail to the

If special bail.

(a) Form of bail-piece is the same as in other actions, only it states "A. B. is delivered on bail upon *habeas corpus*." The recognizance also is the same as in other cases.

judge's

judge's clerk, who will take their acknowledgment, and then notice thereof must be given to the plaintiff's attorney.

Of putting in
bail *de bene esse*.

In B. R. if bail be taken in the absence of the plaintiff, or his attorney, the same is taken *de bene esse*; and if, on due notice in writing of the names and places of abode of such bail, the time when put in, and before whom, no exception thereto be taken by the plaintiff in *twenty-eight days* after the putting them in, the bail-piece shall then be filed within *four days* next after the end of the *twenty-eight days*. Mich. 16 Car. 2.

Of excepting
thereto.

In C. B. if bail be taken *de bene esse*, and on notice being given of the names and places of abode of the bail, the time when put in, and before whom, no exception thereto be taken in *twenty days*, the bail-piece shall be filed within *four days* next after the expiration of the *twenty days*. Hil. 13 & 14 Car. 2.

And unless the bail, in case of no exception within time, be not filed within the *four days*, a *procedendo* may be granted upon a certificate that the bail is not filed. Same rules.

Of compelling
defendant to
justify his bail.

If the plaintiff dislikes the bail put in, he serves the defendant's attorney with another rule or order for a *procedendo*, unless better bail be put in within *four days* after service thereof, whether it be in term or vacation.

Of the service of
the rule in va-
cation.

If this rule is served in *vacation time* in B. R. the practice is, for the defendant's attorney to give notice only within the rule, that the bail will justify on the first day of the ensuing term.

But on service of such rule in *vacation time* in C. B. it is usual to justify within the four days before a judge at his chambers, for which 2s. is paid; and on the first day of the ensuing term justify in court.

How if bail do
not justify in
time.

A cause was removed by *habeas corpus* in vacation time, and the bail put in on the removal ought to have justified on the first day of the ensuing term, (a rule having been served on the defendant for a *procedendo*, unless better bail,) and the bail not having offered themselves the first day of the term, a *procedendo* was sued out to remand the cause. On the second day of the term, the bail came and offered to justify, but were then too late: however a rule was obtained to shew cause why the *procedendo* should not be set aside: but on shewing cause, the rule was discharged, for it was said, that should this rule be made absolute, it would operate as a second *habeas corpus*, which can never be granted after a cause is once remanded by a *procedendo*. Anon. B. R. 1778. The counsel offered to pay costs of the *procedendo*, but nevertheless the court discharged the rule.

How if same
bail below be-
come bail above.

If a cause is removed by *habeas corpus* out of the Marshalsea, or other inferior court (London excepted), and the bail below offer to be bail above, the plaintiff cannot except to them,

them, but is compellable to take them, because he might but did not except to them below. But it is otherwise in a cause from London, for the sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff; so that the plaintiff has not the liberty of excepting against them, and the clerk is not responsible if they be deficient in the court above, though he was in London. Salk. 97.

When bail is taken of a prisoner in custody the judge's clerk in C. B. is to deliver the bail to the *prothonotary* to be filed, if assented to; and for that purpose the *prothonotary's* fees are to be deposited; but the prisoner is not to be discharged until the bail be assented to, or the plaintiff overruled in the open court to accept the same upon examination. Mich. 1654. Hil. 13 & 14 Car. 2.

Of bail when defendant is a prisoner in custody.

If the defendant is an actual prisoner in an inferior court, and brings an *habeas corpus* to remove the action into a superior court, the *habeas corpus* will not discharge him out of custody till bail is put in above and perfected; therefore it is the better way to gain the defendant his liberty to put in bail below, and then to remove the cause into the superior court, if he would have it there determined.

An action was brought in the sheriff of London's court against two partners, one brought an *habeas corpus*, and put in bail for himself only. And a *procedendo* being moved for, it was granted: for otherwise, the plaintiff would be disabled to go on in either court. *Fry v. Carey*, Str. 527.

How if only one of two defendants put in bail.

If one be removed into B. R. by *habeas corpus*, and puts in bail, the bail are liable to all other actions, as well as that for which they become bail, at the suit of the same plaintiff mentioned in the return of the *habeas corpus*, wherein he shall declare against the said defendant within two terms next after; but see the next case.

The defendant was arrested by process out of an inferior court, in a plea of *trespass on the case*; bail was given, the plaintiff declared, and the cause was removed by *habeas corpus*; and then the plaintiff delivered two declarations, one for words, the other upon an *assumpsit*. *Per Hale*—If a plaintiff has declared before the *habeas corpus* delivered, the bail shall be special only as to that action, and shall be common to the other: but if no declaration before *habeas corpus*, then the bail put in upon the *habeas corpus* shall be special bail to all actions of the plaintiff against the defendant of that term; and the plaintiff cannot declare before *habeas corpus* allowed. *Serle v. Newton*, Hil. 25 & 26 Car. 2.

Of the extent of the liability of the bail.

The practice in other respects as to notices of bail, exception thereto, and justifying bail on *habeas corpus*, is the same as in other cases, for which refer to Vol. I. Ch. iv. Sec. v.

(D. 3. e)

(D. 3. e) Of Declaring, Pleading, &c.

Plaintiff must
declare *de novo*.

In civil cases, the record itself is never removed by *habeas corpus*, but remains below; therefore the plaintiff must declare *de novo*, and the declaration is exactly the same as in other cases: and if in B. R. he is stated to be in *custodia marischalli*. Salk. 352.

When he must
declare.

The plaintiff must declare before the end of the second term after the return of the *habeas corpus*, otherwise the defendant is not bound to accept a declaration. And note, If the *habeas corpus* is returnable in term, that term is one; and the plaintiff must declare before the end of the succeeding term. *Hutton v. Stourbridge*, Stra. 631.

According as
bail is put in.

There is no limited time for the plaintiff's getting an order for a *procedendo*, unless bail be put in. Barnes, 90. But if the defendant puts in bail in time, and the plaintiff does not declare in two terms, the cause is out of court.

Of the venue in
the action.

If a cause is removed by *habeas corpus* out of the courts of Canterbury, Southampton, Hull, Litchfield, Pool, or other counties, where the judges of *nisi prius* seldom go, if the action be transitory, it must be laid in the county of Kent, Hampshire, Yorkshire, Staffordshire, or Dorsetshire, or other county in which such city or town lies, and the recognizance is to be taken accordingly. Mich. 1654.

No non pros for
want of declaration.

When a defendant has removed his cause into the superior court, and perfected his bail, he cannot sign a *non pros* for want of a declaration, as the plaintiff is not in court till he has declared, and the cause is supposed to be removed against his inclination. *Davis v. James*, 1 D. & E. 372.

No declaring
de bene esse.

The plaintiff cannot declare *de bene esse*; for the several rules, which permit a plaintiff to deliver his declaration *de bene esse*, apply only to such actions as have their commencement originally by process, issued out of the court above; but if a cause be removed, plaintiff must stay until defendant is fully in court and declare in chief. Ni. Pri. 10 W. 3. K. B.

Difference of
habeas corpus in
criminal and
civil proceedings.

The difference between an *habeas corpus* in a criminal and civil case is apparent. For if one be in custody, and indicted for some offence in an inferior court, there must, beside the *habeas corpus* to remove the body, be a *certiorari* to remove the record; for as the *certiorari* alone removes not the body, the *habeas corpus* alone removes not the record itself; but only the prisoner with, the cause of his commitment. And therefore, though the court, on the *habeas corpus* and return, can judge of the sufficiency and insufficiency of the return and commitment, and bail, or discharge, or remand the

the prisoner, yet they cannot upon the bare return give any judgment, or proceed upon the indictment, order, or judgment, without the record itself be removed by *certiorari*; the same stands in the full force it did, though the return be adjudged to be insufficient, and the party discharged of his imprisonment; and the court below may issue new process on the indictment. Whereas an *habeas corpus* in a civil case suspends the power of the court below, and if they proceed afterwards, their proceedings are *coram non judice*.

But after bail are put in above, plaintiff may declare *de bene esse* before they justify. Imp. K. B. 623.

The time for pleading is the same as in other cases; namely, four days, if defendant lives within twenty miles of London; if above that distance, eight days. There are many old cases in the books, which seem to contradict this practice, but they were before the rules of court of 5 & 6 Geo. 2. in B. R. and Mich. 3 Geo. 2. in C. B. by which the time is now regulated. Of the time for pleading in bar.

No imparlance is allowed upon a *habeas corpus*, although declaration be not delivered the same term *habeas corpus* is brought. Imp. K. B. 623. 1 Wils. 154. No imparlance.

For the general rule of imparlance does not extend to cases of removal by *habeas corpus*. *Smith v. James*, 6 D. & E. 752.

Pleas in abatement must be within the four days as in other cases. Of pleading in abatement.

Debt against a *feme sole* in the palace court, and after appearance and plea pleaded she married, and then removed the cause by *habeas corpus*; and after the plaintiff had declared against her above, she pleaded her coverture in abatement, viz. that she was married at the time the *habeas corpus* sued out: and it was ruled a good plea, for the proceedings are *de novo*, and the court takes no notice of the proceedings below. But the court said, that if this matter had been moved on the return of the *habeas corpus*, they would have granted a *procedendo*; for though an *habeas corpus* be a writ of right, yet where it is to abate a rightful suit, the court may refuse it. 1 Salk. 8. Coverture when pleadable.

Defendant, whilst a *feme sole*, was arrested in the palace court; and a day or two after the arrest married, and then removed the plaint by *habeas corpus* into C. B. and pleaded her *coverture in abatement*. Whereupon plaintiff obtained a rule to shew cause why the plea should not be set aside, which, on hearing counsel, was made absolute. Barnes, 355. *Haddorte v. Howard*.

The proceedings subsequent to the declaration, are the same as in other cases.

(D. 3. f)

If the defendant
does not com-
ply.

(D. 3. f) *Of the Procedendo.*

If the defendant, upon removing a suit commenced against him by *habeas corpus*, does not comply with the statutes and rules of court made to regulate the proceedings therein upon such removal, as by *not putting in bail, where special bail is required; or not justifying bail in due time, when served with a rule; or not pleading in due time to the declaration delivered, or the like*; the plaintiff may obtain a *procedendo*, and get the cause remanded.

A *procedendo* is a writ grantable by any judge of the court into which the cause was removed, upon application to one of their clerks at chambers. Which, when engrossed on a two shilling stamped piece of parchment, must be signed and sealed. The writ is to this effect:

"GEORGE the Third, by the grace of God, &c. To
"the sheriff of _____ or judges, &c. (styling the
"court and judges thereof properly), greeting. Although
"we lately by our writ commanded you, that you should
"have the body of C. D. detained in our prison under your
"custody, as it was said, under the safe and secure conduct,
"together with the day and cause of his being taken
"and detained, by whatsoever name the said C. might be
"called, in the same, before our right trusty and well-be-
"loved Lloyd lord Kenyon, our chief justice assigned to hold pleas
"before us, at his chambers, situate in Serjeants Inn, Chan-
"cery-lane, immediately after the receipt of that writ, to
"do and receive all and singular those things which our
"said chief justice should then and there consider of him
"in that behalf; yet we, being now moved with certain
"causes in our court before us, command you and every of
"you, that in all complaints or suits against the said C. at the
"suit of A. B. in our court before you, or any of you levied
"or affirmed, or before you or any of you now depending
"undetermined, you proceed with what speed you can in
"such manner, according to the law and custom of Eng-
"land, as you shall see proper. Our said writ to you
"thereupon first directed to the contrary in any thing not-
"withstanding.
"Witness, &c.

"[Stormont and Way.]"

For which a *præcipe* is made for the office as follows:

Middlesex, *Procedendo* for J. S. against G. H.
T. S. attorney.

Upon

C
tem
abid
rity

Upon carrying the writ of *procedendo* to the secondary of the court to which it is directed, and filing it, the court instantly reassumes the jurisdiction of the cause. And as the writ of *habeas corpus* removes all causes that were in the court, against the defendant, so the writ of *procedendo* remands all back again.

Care must be taken that the *habeas corpus* and *procedendo* are directed properly to the inferior courts. [For which direction, see *Introd. E.*]

[*Introd. E.*]

After interlocutory, and before final judgment in an inferior court, an *habeas corpus cum causa* was brought; before the return of the writ the defendant died, and a *procedendo* was awarded; because, by the 8 & 9 W. 3. c. 11. the plaintiff may have a *scire facias* against the executors, and proceed to judgment, which he cannot have in another court; and by this means he would be deprived of the effect of his judgment, which would be unreasonable. Salk. 352.

By the stat. 21 Jac. 1. c. 23. sec. 3. whenever the action is remanded back to the inferior court by writ of *procedendo* or other writ, the said action shall never afterwards be removed or stayed before judgment by any writ out of any court whatever.

If after a *procedendo* to carry back a cause to an inferior court, the plaintiff recover and then sue out a *scire facias* against the bail below, and they remove the proceedings against them into K. B. by *habeas corpus*, the court will award a *procedendo* in the suit against the bail; for the proceeding by *scire facias* is merely an attendant on the original cause, and ought to be in the same court as the original action. *Dixon v. Heslop and another*, 6 D. & E. 365.

A cause was removed from an inferior court by an *habeas corpus cum causa* to which a return was made, stating a custom under which the defendant was sued and arrested. Error was suggested upon the face of the proceedings below, this court would not stay the *procedendo* merely on that ground, but said they would leave the defendant to his writ of error. *Horton v. Beckman*, 6 D & E. 760.

SECTION IV.

Of Proceedings in Outlawry.

Outlawry is a punishment inflicted on a person for a contempt and contumacy, in refusing to be amenable to, and abide by the justice of that court which hath lawful authority to call him before them; and as this is a crime of the highest

Outlawry what.

highest nature, being an act of rebellion against that state or community of which he is a member, so doth it subject the party to divers forfeitures and disabilities; for hereby he loseth *liberam legem*, is out of the king's protection, &c. Co. Lit. 128. Rol. Ab. 802. Doct. and Stud. dial. 2. c. 3.

Forfeitures incurred thereby.

In criminal cases.

With respect to the forfeitures for refusing to appear, the law distinguishes between outlawries in capital cases, and those of an inferior nature; for as to outlawries in treason and felony, the law interprets the party's absence a sufficient evidence of his guilt, and, without requiring further proof or satisfaction, accounts him guilty of the fact, on which ensues corruption of blood, and forfeiture of his whole estate, *real and personal*.

In civil cases.

But outlawry in lesser crimes, or in *personal actions*, does not occasion the party to be looked upon as guilty of the fact, nor does it occasion an entire forfeiture of his real estate, but yet it is very fatal and penal in its consequences; for hereby he is restrained of his liberty if he can be found, forfeits his goods and chattels, and the profits of his lands, while the *outlawry* remains in force. Plow. 941. 9 H. 6. 20. b.

Nature of outlawry in civil cases.

Outlawry lies either upon *mesne* process, or after judgment upon *judicial* process. In the former it is to compel an appearance to the suit; in the latter to procure satisfaction of the judgment: and in *civil* actions it is considered as in the nature of civil process. The forfeiture, though nominally to the king, yet in truth goes to the plaintiff towards payment of his demand. If the outlaw appears, pays all the costs, puts in sufficient bail, and does every thing he can to put the plaintiff in as good a condition as he would have been in originally; or if *after* judgment, the outlaw pays the debt and costs, the court reverses the outlawry upon motion without any writ of error. The form of the reversal is—“For the errors *assigned* and other *errors appearing upon the records*,” although in truth there is no error at all. Burr. 2549.

Having shewn the general nature of outlawry in criminal and civil cases, we will now confine ourselves to the proceedings in outlawry in *civil actions*, and consider—

(A) In what Cases Outlawry may be necessary.

(B) In what Actions and against whom it lies.

(C) Of the Process to Outlawry; and herein of the original Writ, the Exigent, Allocatur, and Proclamation.

(D) Of

(D) Of obtaining Satisfaction against the Outlaw by *Capias Utlagatum* against his Person, or special *Capias Utlagatum* against his Person, Chattels, and Lands.

(E) Of the Appearance of Defendant upon the Exigent, or after Outlawry, and the Reversal thereof by Motion or Writ of Error.

(F) Of declaring after Outlawry reversed or superseded.

(G) Of Restoration after Outlawry reversed or determined.

(H) Of the Outlawry after final Judgment.

(A) In what Cases Process to Outlawry may be necessary.

(A)

If a debtor absconds, or secretes himself so that plaintiff cannot arrest him, and if he has goods or estates within the realm, it may be advantageous for the plaintiff to resort to the process of outlawry, which will either compel his appearance, or enable plaintiff to obtain satisfaction from his chattels or land.

If defendant absconds or secretes himself.

So, if it be a joint action against many defendants, and some or one of them cannot be found, it is necessary for plaintiff to proceed to outlawry against him or them; for he cannot declare against the rest until all are in court.

Or if one defendant in a joint action, cannot be found.

1 Str. 473. 1 Will. 78.

In which case, in order to prevent the bail from being discharged, or the other defendants, if prisoners, obtaining a *superfedeas*, take care, before the end of the second term from the return of the writ, to get a rule to declare against such defendants, serve it on the attorney, and take out such rule from term to term till the other defendants come into court or are outlawed; when this rule is applied for, tell the clerk of rules that you are proceeding to outlawry, as it may be drawn up specially accordingly.

In which case rule to declare should be taken out.

When the outlawry against such defendants is complete, declare against all, and intitle the declaration the term when the outlawry is complete, and not of the term the first writ is returnable. 1 Will. 78.

How declaration to be intitled.

Upon a bill of Middlesex against two, one only puts in bail, and the other could not be found, plaintiff then sued out an original against both, and outlawed both. *Per cur.* Though

How if both be outlawed when one has appeared.

you

you could not proceed on the bill of Middlesex, and though it was necessary to join the other, who could not be arrested with the defendant, in the same original, yet you could not go on to outlawry against him; you should have outlawed one only, and then you might have come in and declared upon the original, that A. together with B. his late partner *assumpsit* *super se*; but the proceeding here is altogether irregular, because the party was in court, and has done every thing in his power to put the plaintiff in a fair way of recovering his debt; he could not appear or file bail for the other partner, because an action would lie against him for doing it without authority. The court ordered the outlawry to be reversed, and plaintiff to pay costs. *Edwards v. Carter and another*, Str. 473.

(B) (B) In what Actions and by and against whom it lies.

Outlawry lies where *capias* lies.

In what actions at common law.

In what by statute.

Against whom outlawry lies. Not against a peer; nor an infant under fourteen.

Against women, who are called waived.

Why.

In all actions where a *capias* lies, plaintiff may proceed to outlawry.

By the common law, a *capias* was the process in all actions of trespass *quare vi & armis*; herein therefore process of outlawry lay by the common law.

But in account, debt, detinue, annuity, covenant, replevin, no *capias* lay at common law, but only summons and distress infinite, and therefore the *capias* and outlawry in these actions were introduced by divers acts of parliament.

In civil actions between party and party, a *capias* or *exigent* does not regularly lie against a lord of parliament of England, whether secular or ecclesiastical. 3 Bac. Ab. 750.

Nor against an infant under the age of fourteen; but such outlawry is not void, only voidable on writ of error. *Ibid.*

Outlawry lies against a woman, whether a *feme covert* or *sole*, as the case may be; but a woman is not said to be outlawed but to be *waived*, and if the return to the exigent be, that she is outlawed instead of waived, it would be error. *Ibid.*

The reason of this distinction is said to be, because women are not sworn in leets or tourns as men are; men therefore are called *utlagati*, i. e. *extra legem positi*; but women are *waivate*, i. e. *derelicta*, left out or not regarded, because they are not sworn to the law. Co. Lit. 122. b.

(C) Of

(C) Of Process to Outlawry.

(C)

Process to outlawry lies in no case but where a *capias* lies.

Lies only where *capias* lies.

So that, when the proceedings are by *bill*, as there can be no *capias* upon a bill, so there can be no process of outlawry. Leon. 329. Sid. 159. Keb. 577.

Not in proceedings by bill.

Nor can defendant be outlawed by process, whether a *capias* or not, with an *ac etiam*.

Nor on process with *ac etiam*.

Because the *capias* to warrant an outlawry must be the *capias* which is given as a process upon the original; the offspring of an original writ, and awarded only upon an actual or supposed disobedience thereto. No one, therefore, can be outlawed for any civil matter, unless the suit be commenced by original, and the *capias* is given as process upon the original.

From the nature of the *capias* requisite.

So that not only in proceedings by bill, or by attachment of privilege, but also in those actions where the *summons* is the proper process upon the original writ, the defendant cannot be prosecuted to outlawry.

Nor on original writ and summons.

The process to outlawry must therefore be by special original in K. B. and this whether the outlawry be to compel an appearance on *mesne* process, which is the most usual, or after judgment.

But must be by special original.

But it may be either by special original, or common *capias quare clausum fregit*, in C. B.

But since the statute 12 Geo. 1. c. 29. we do not often hear of a defendant being outlawed by a common *capias quare clausum fregit*; because, if the plaintiff's cause of action does not warrant him to arrest and hold the defendant to bail, he is generally served with a copy of the process, with a notice subscribed to appear; and upon no appearance within eight days after the return of the process, the plaintiff is at liberty, upon an affidavit made of the process having been duly served on the defendant, to enter an appearance for him, and proceed as if he had regularly appeared to the action. This method, therefore, in cases not warranting bail, if the defendant can be met with, being more easy and expeditious, and attended with little or no expence to the suitor, compared with proceeding towards outlawry, affords one reason why outlawry is not often heard of now upon common *capias's quare clausum fregit*. Another, and perhaps the chief reason is, that should a plaintiff proceed with an intention to outlaw the defendant upon common *capias's*, and the defendant even not come in till after the *exigi facias*, he may, notwithstanding, reverse the outlawry had against him, without being compelled to put in bail to the action. So that the plaintiff, instead

instead of gaining any advantage, in proceeding to *outlawry* upon *common capias's*, and not pursuing the line chalked out by the statute for his own expedition, is not only put to expence, but is himself the occasion of his own delay, and frequently in a worse situation towards recovering his demand than he otherwise might have been, if he had proceeded as the statute directs him. 2 Crom. Prac. 34.

As a fine is paid to the king on suing out an original, and the expences are increased by the proceedings, the costs of such action are of course greater, but the court of K. B. only allow *common costs*, unless the debt be 50*l.* or upwards.

How to proceed.

The *præcipe*.
[Intro. L.]

Make out *præcipe* for original, which, in an action on the case, or of trespass, must recite the whole cause of action as in a declaration. [For the form thereof, see *Introduction L.*] See also proceedings by special original, Ch. v. Sec. i.

Take *præcipe* to *filazer*, whether in B. R. or C. B. who will make out *capias*, *alias*, and *pluries*.

If the *præcipe* is carried to the *curfitor*, before the *effoign-day* of the term, he will make the *original* returnable on any return of the preceding term. The *original* is returned of course thus :

Pledges for prosecuting, { John Doe.
Richard Roe.

Capias, *alias*,
and *pluries* may
be taken out
together.

Plaintiff has no need to wait till the *capias* is spent, then to take out an *alias*, and endeavour to arrest the defendant, and after that a *pluries* ; but he may, for expedition, get them all of the *filazer* at once, (if there is time since the cause of action accrued to allow of the proper *teste* and *return* to each writ,) and return them severally of course after this manner :

" The within-named C. D. is not found in our bailiwick."
The answer of

A. B. Esq. }
and } Sheriffs.
C. D. Esq. }

How tested, &c.

The *original* writ must have *fifteen days* at least between the *teste* and return. The *capias* also must have *fifteen days* between its *teste* and return ; and should regularly bear *teste* on the return-day of the *original* : the *alias* also must have the same number of days, and should bear *teste* the return-day of the *capias* ; and the *pluries capias* must have the same number of days, and should bear *teste* the return-day of the *alias* ; whereas, if a plaintiff sues by *original*, and does not mean to proceed to *outlawry*, the *capias* may bear *teste* before the *original*, and even before the cause of action accrued, so long as it is actually taken out afterwards ; for you cannot have oyer of the *capias*, so as to take advantage of it. Barnes, 173. And so held in B. R. East. 18 Geo. 3.

The

The proceedings are exactly the same towards *outlawry* upon a *common capias quare clausum fregit*, as on a *special capias*.

Same proceedings on common capias.

It has been often questioned, whether an *affidavit* was necessary to be made of the *debt*, when a plaintiff sues by *special original*, previous to the issuing of the process. But it was determined in Lord Hardwicke's time, M. 10 Geo. 2. *Fownes* and *Allen*, that process of outlawry is not within the statute 12 Geo. 1. c. 29. so there is no need of an *affidavit*, when the plaintiff sues by *special original*, especially as the 5 Geo. 2. c. 27. s. 5. enacts, "That no special writ, nor any process specially therein expressing the cause of action, shall be sued forth or issued from any superior court, where the cause of action shall not amount to 10*l.* or upwards." Since which statute, as no *special writ* can issue where the cause of action is not above 10*l.* it seems, that, before the issuing of a *special writ*, no *affidavit* is necessary; because a sheriff, if he apprehends the party either upon the *special capias*, *alias*, or *pluries*, before he lets him go out of his custody, for his own safety, should take bail; and he can easily know to what amount to take bail, as the whole cause of action is spread and set forth in the writ. *Vide* the case of *Cracroft v. Gledowe*, Burr. 4 pt. 1482.

Affidavit of debt not necessary on the process.

In C. B. it was held, that on process to *outlawry*, no *affidavit* for bail is required by statute, or the course of the court. *Barnes*, 322.

There can be no harm however in making an *affidavit*.

When the *pluries writ* is returnable, get it from sheriff's office, file warrant of attorney for plaintiff, and get *pluries* marked by clerk of warrants; upon which an *exigent* and proclamation may be made out.

How to proceed when writs returnable.

Upon the return therefore of *non est inventus* to the *pluries capias*, process of *outlawry* begins, which is the writ of *exigi facias*. In B. R. the *filazer* acts as the *exigenter*: in C. B. the *exigenter* is a distinct officer from the *filazer*.

Of the *exigi facias*.

The writ of *pluries capias*, when sealed and returned, is the warrant for the *exigenter* to make out the *exigi facias* and writ of proclamation thereon.

Every attorney shall file his warrant of attorney of the term wherein any *exigent* is awarded, upon pain of forty shillings for every time he offends, and is attainted by due examination of the justices of this court; such warrant to be filed upon or before the *essoign-day* of every Trinity term, and within twenty-one days after the end of every other term. Hil. 14 & 15 Car. 2. C. B.

Warrant of attorney must be filed.

No *exigenter* shall receive any *pluries capias*, in order to make an *exigent* or proclamation thereon, before the same be

Pluries signed by clerk of warrants.

- be signed or stamped by the clerk of the warrants, or his deputy, to the end it may appear, that the warrant of attorney is duly filed. Hil. 2 & 3 Jac. 2.
- Nature of the exigent.** The writ of *exigi facias*, or *exigent* as it is called, is a writ requiring the sheriff to cause the defendant to be demanded, or *exacted*, in five county courts successively, and if he should appear, to take him as on a *capias*.
- Advantage of outlawries in London.** In London the courts, which are called the hustings, are held much oftener than at any other place; plaintiffs therefore who intend to proceed to outlawry, generally lay their actions in London, to expedite the return of the *exigent*, and thereby get the defendant sooner outlawed.
- Teste of exigent.** The writ of *exigent* must go to the sheriff of the county where the action is laid; and should bear *teste* the *quarto die post* of the *pluries capias*.
- How if in London.** If the *exigent* goes into London, as is usual in outlawries, for expedition, carry it to one of the compters, where clerks attend for the purpose, who require the defendant, upon five several hustling-days; and if he does not appear upon the *quinto exactus*, he is returned outlawed.
- Writ of proclamation.** Formerly there was no other process than that of the *exigent*; for the action used to be laid where the defendant really was, and the sheriff endeavoured with due diligence to find him upon the *capias*; but as in time sheriffs became regardless of their duty, and neglected seeking after defendant upon the *capias*; and began to return the *alias* and *pluries writs* with a *non est inventus* of course; the *exigent* often issued, and men were outlawed without knowing of any process being sued out against them; especially as by degrees the *venue* in actions became transitory, and was laid not in the county where the defendant resided, so that it was not probable that upon the *exigent* he should know any thing of the exactions at the county courts.
- Regulated by statute 31 Eliz.** To prevent such secret outlawries, the statute 4 H. 8. c. 4. amended by the 6 H. 8. c. 4. and lastly, the 31 Eliz. c. 3. were passed, by the last of which it is enacted, "That in every personal action, wherein any writ of *exigent* shall be awarded out of any court, one writ of proclamation shall be awarded and made out of the same, having *day of teste* and *return*, as the said writ of *exigent* shall have, directed and delivered of record to the sheriff of the county where the defendant at the time of the *exigent* so awarded shall be dwelling; such writ of proclamation shall contain the effect of the same action, and that the sheriff of the county, unto whom any such writ of proclamation shall be directed, shall make three proclamations in this form, one in open county court, one other at the general quarter sessions of the
- Teste of writ,**
- where directed.**
- Number of proclamations and how to be made.**

" the peace, where the party defendant at the time of the
 " *exigent* awarded shall be dwelling, and *one other* to be
 " made one month at the least before the *quinto exactus*, at or near
 " the most usual door of the church or chapel of that town or
 " parish where the defendant shall be dwelling at the time
 " of the *exigent* awarded; and if he shall be dwelling out of
 " a parish, then in such place of the parish in the same
 " county next adjoining, and upon a Sunday after divine
 " service, and such writ to be duly returned, or the outlawry
 " to be void."

The writ of proclamation therefore is to bear the same *teste* and return as the *exigent*; but is to be directed to the sheriff of the county where defendant lives, whether a county palatine or other franchise in England or Wales.

The sheriff having made three proclamations as directed by the statute of Eliz. if defendant does not appear before the *quinto exactus* on the *exigent*, he is pronounced outlawed by the coroner. Then the sheriffs return the writs, the return to the *exigent* specifying the five county courts when he was exacted, and the judgment of outlawry, and the return to the writ of proclamation, particularizing when and where he was duly proclaimed. Effect of writ.
How to be returned.

If it should happen that there should not be five county courts between the *teste* and return of the *exigent*, you may upon application to the *exigenter* get an *allocatur exigent*, allowing the number of county days which have already been between the *teste* and return, and demanding him again to appear; and if five should not be returned upon the *allocatur*, the *filazer* will make out another *allocatur*. But it is to be observed that the *exactions* must be made at five county courts *successively*, so that if any court hath intervened between the last county court and the return, at which defendant was not exacted, you cannot have an *allocatur*, but a new *exigent* must go, and the *exactions* be made *de novo*. Of the allocatur exigent.

All outlawries pronounced without proclamation awarded and returned according to the statute are void.

The most scrupulous exactness is required in cases of outlawry, in the returns made by the sheriff and the like. The *King v. Almon*, 5 D. & E. 204. See also the *King v. Tondell*, 4 D. & E. 521.

When the *exigent* and proclamation are returned, the proclamation must be filed with the *exigenter*, and the *exigent* taken to the clerk of outlawries, in C. B.; but in K. B. both may be taken to the *filazer*. Writs to be filed.

The defendant being thus declared outlawed, the next step for plaintiff to take is, to obtain satisfaction against such outlaw, law,

law, which may be by process either against his person, his chattels, or his land.

(D) (D) Of the Satisfaction against the Outlaw's Person, Chattels, and Lands.

Of the different remedies of the party.

When outlawry is duly pronounced, and the writs of *exigent* and proclamation are returned by the sheriff and recorded above, the plaintiff is at liberty to take out further process against him; and this process is either general or special. The first is a writ of *capias utlagatum*, by which only the body can be arrested and imprisoned. The latter is a special *capias utlagatum*, by which his body may not only be imprisoned, but his goods and chattels, lands and choses in action seized, and extended. We will consider each in their order:

1. Of Proceeding against the Person of the Outlaw.

How *capias utlagatum* made out.

The *capias utlagatum* is made out by the *filazer*, directed to the sheriff of the county where defendant is likely to be found, who proceeds to take him accordingly.

Defendant not to be discharged without *superfedeas*.

No sheriff, under-sheriff, their deputies or bailiffs, shall set at liberty any person arrested upon any *capias utlagatum*, until he receive a *superfedeas* according to law from the proper officer appointed. 13 Car. 2. stat. 2. c. 2. f. 4.

Formerly not admitted to bail.

Formerly, if a defendant was arrested upon the *capias utlagatum*, the sheriff could not admit him to bail, as an outlawed person was excepted out of the statutes of 23 Hen. 6. c. 9. and 13 Car. 2. stat. 2. c. 2. (unless by *superfedeas* first had and received for discharging him).

How altered by 4 & 5 W. & M.

But by the 4 & 5 W. & M. c. 18. f. 4. it is enacted, "That if any person outlawed in the *said court* (a) (other than for treason and felony) shall be taken and arrested upon any *capias utlagatum* out of the said court, it shall and may be lawful for the sheriff who hath or shall arrest such person (in all cases where *special bail* is not required by the said court) to take an *attorney's engagement*, under his hand, to appear for the said defendant, and to reverse the

If the action be not bailable.

(a) "The *said court*," means the court of King's Bench; the statute being made to prevent malicious informations in the court of King's Bench, and for the more easy reversal of outlawries in the same court. But notwithstanding, all persons arrested upon the *capias utlagatum* out of the Common Pleas, after outlawry there, have always been bailable since the making thereof, and before might have been discharged by a *superfedeas* to the *capias utlagatum*. Vide *feft.* in 13 Car. 2. c. 2.

"*said*

" *said outlawry* ; and thereupon to discharge the said defendant from such arrest : and in those cases, where *special bail* is required by the said court, the said sheriff shall and may take security of the said defendant by bond, with one or more sufficient sureties, in the penalty of double the sum for which special bail is required, and by more, for his appearance by attorney, in the said court, at the return of the said writ ; and to do and perform such things as shall be required by the said court ; and after such bond taken, to discharge the said defendant from the said arrest."

If it be bailable.

And by sect. 5. it is further enacted, " That if any person outlawed as aforesaid, and taken and arrested upon a *capias utlagatum*, shall not be able, within the return of the said writ, to give security as aforesaid, in cases where special bail is required, so as he be committed to gaol for default thereof, that whensoever the said prisoner shall find sufficient security to the sheriff, in whose custody he shall be, for his appearance by attorney in the said court, at some return in the term then next following, to reverse the said outlawry, and to do and perform such other thing and things as shall be required by the said court ; it shall and may be lawful for the said sheriff, after such security taken, to discharge and set at liberty the said prisoner for the same."

If defendant can find bail after he is in custody.

By the above statute, when the defendant is arrested on a *capias utlagatum*, if the original action be not a bailable one, he is discharged upon the attorney giving an undertaking for his appearance ; but if it be a bailable action, he must put in special bail according to the form above prescribed by the statute, the condition of the bond being more special than in common bail bonds ; and the sheriff in such case must take bail, although the *capias utlagatum* was not marked for bail, and no affidavit made of the debt.

Sheriff must take bail though writ not marked for bail.

Defendant being arrested on a *capias utlagatum*, the sheriff took an attorney's engagement, under his hand, to appear for the defendant and reverse the outlawry, without taking security, by bond, in double the sum for which bail was required, pursuant to the act of 4 & 5 W. & M. c. 18. On shewing cause, why an attachment should not issue against the sheriff for discharging the defendant out of his custody, it was urged, that he neither did nor could know, that it was a case requiring bail, as the *capias utlagatum* was not marked for bail ; and that 12 Geo. 1. c. 29. required an affidavit ; and that the sum, for which bail is to be taken, is to be marked on the process, &c. For the plaintiff, it was urged, that process of outlawry is not within the statute 12 Geo. 1. that this was by *special original* ; and the cause

If action above 101.

of

of action was expressed in the *original process*, in which it appears he was entitled to bail. The court were clear, that this was not a case within the 12 G. 1. and thought the sheriff had acted improperly; but, as there was an affidavit of the under-sheriff, that he had acted to the best of his understanding, without any ill intention, they enlarged the rule in order to give the sheriff an opportunity to put in bail. After which the sheriff undertook to pay the debt and costs. *Cracraft v. Gledowe*, Burr. 4 pt. 1482.

One of the defendants was arrested on a *capias utlagatum*. The sheriff admitted him to bail, and on being ruled to return the writ, returned *cepi corpus*. On which plaintiff ruled the sheriff to bring in the body. The bail came to justify. Plaintiff opposed their justification to the *original action*, insisting that the *costs* of the *original action* must be first paid; and that the bail must be put in to a new *original*, according to the statute 31 of Eliz. for both defendants, and not bail to the *original action*, which was now ended. And the court refused their justification, and on motion the court granted an attachment against the sheriff. *Philips and others v. Warburton and Randal*, B. R. Mich. 26 Geo. 3.

What a good return by sheriff.

Bail cannot justify to the original action.

Defendant not bailable if outlawed after judgment.

Defendant is not bailable if taken upon a *capias utlagatum* after judgment. The principle in all the cases is, that defendant shall not be in a better condition by standing out to outlawry, than if he had been taken on the first process.

2. Of obtaining Satisfaction from the Outlaw's Chattels.

Nature of special *capias utlagatum*.

This is done by suing out a special *capias utlagatum*, to be obtained at the *filazer's*, whereby the sheriff is directed to inquire what goods and chattels, lands and tenements, defendant had in his bailiwick at the time he was outlawed, and to extend and appraise the same, and to answer for the value or issues thereof; and also is commanded to take the body of defendant, if he can be found.

How to proceed.

If, upon the *special capias utlagatum* any goods are taken, and the defendant is not likely to put in bail to the action, or does not move to *superfede* or *reverse the outlawry*, you may get a satisfaction out of his goods; but if the same do not amount to something considerable, so as to pay all the charges of petitioning, &c. it will not be worth while to proceed.

If the plaintiff, in such case, thinks it worth his while to proceed, he must get the sheriff to extend and appraise the goods by an inquest; which the sheriff will summon if requested, the plaintiff paying the charges thereof, amounting to about two or three guineas; and if it is necessary, the plaintiff

(a) that the disable and the king's

(b) any in term allowed

Vo

plaintiff may take out a *subpœna* for witnesses to attend and give evidence upon the inquisition.

The inquisition being taken, get the *capias utlagatum* returned with the inquisition annexed, which must be carried, if in B. R. to the *filazer*, who acts as clerk of the outlawries, and if in C. B. to the clerk of the outlawries, who will transcribe the inquisition, and transmit it into the court of Exchequer (a). Which being done, apply to a clerk in the Remembrancer's office for a *venditioni exponas* (b), by virtue of which the sheriff will sell the goods. And if the money raised thereby exceeds not 50*l.* the court of Exchequer, on motion, will order it to be paid to the plaintiff; but if it exceeds that sum, the plaintiff must petition the lords of the Treasury for it, who refer it to their *solicitor*, to examine into the merits of the plaintiff's demand. The petition may be in this form :

Writ must be returned.

Transcript of inquisition.

Above what amount there must be a petition.

How to petition.

" To the Right Honourable the Lords Commissioners of
" his Majesty's Treasury.

" The humble Petition of A. B.

Form of petition.

" Sheweth,

" That C. D. late of being indebted to your petitioner in the sum of 100*l.* your petitioner did, at his very great charge, in November last, prosecute the said C. D. to an outlawry; and by virtue of a *special capias utlagatum*, directed to the sheriff of Middlesex, several goods of the said C. D. were seized, and found by inquisition to be of the value of 86*l.* 4*s.* which goods were afterwards sold by the said sheriff, by virtue of a writ of *venditioni exponas*, at the same price and value at which they were so appraised; and the money thereupon raised still remains in the hands of the sheriff of Middlesex.

" That your petitioner's said debt, and the charge he has already been at in prosecuting the said C. D. to outlawry, greatly exceed the sum so remaining in the sheriff's hands.

(a) The reason of sending the transcript of the record into the Exchequer is, that that court may take charge of the effects of the king, the outlaw being disabled from enjoying any thing he was possessed of, or otherwise entitled to; and the inquest having found him possessed of effects, the Exchequer, as the king's court of ordinary revenue, must take care of them for him.

(b) But an eight-day rule must be given on the back of the transcript, before any *venditioni exponas* can be made to sell them; and if there are not eight days in term, the rule must be for the general seal after term. These days are allowed for any one to come in and claim the goods.

" Wherefore your petitioner humbly prays your lordships,
 " that the money so levied as aforesaid may be paid over to
 " your petitioner.

" And your petitioner, as in duty bound, shall ever
 " pray, &c.

" A. B."

Reference thereon to the solicitor.

" Whitehall, Treasury-Chambers, Feb. 1, 1780.

" The Right Honourable the Lords Commissioners of
 " his Majesty's Treasury are pleased to refer this petition
 " to esq. (*Solicitor to the Treasury*,) who is
 " to consider the same; and report to their lordships a true
 " state of the petitioner's case, together with his opinion
 " what is fit to be done therein.

" A. B. (*Lord of the Treasury*)."

Proceeding
 thereon.

After this reference, the plaintiff must make an affidavit, before one of the barons of the Exchequer, of his debt and proceedings against the defendant, and the charges he has been put unto; which affidavit, with the attorney's bill, *ventidioni exponas*, and return, together with a certificate of the proceedings on the outlawry, from one of the sworn clerks of the Exchequer, must all be laid before the solicitor of the Treasury; and if he is satisfied of the truth of the premises, he makes his report to their lordships accordingly; and thereupon a warrant goes from the Treasury to the attorney-general, to consent that so much of the money as remains in the sheriff's hands, after deducting the poundage, be paid to the plaintiff towards satisfying the debt and costs, on his moving the court of Exchequer for an order for that purpose. On delivering the warrant to the attorney-general, he gives his consent of course; then, on moving the court of Exchequer, an order is made for the sheriff to pay the money over to the plaintiff, which, on sight thereof, he will accordingly do.

The fees and expences in all amount to about 20*l*.

Subpoena.

Service thereof.

Remedy for
 disobedience.

The order must be engrossed and put under seal, with a *subpoena* annexed to perform it, (as in general all orders for payment of money, or where the party is ordered to perform any act, must be,) and the sheriff or party personally served therewith; otherwise, an *attachment* for non-performance thereof will not be granted.

3. Of obtaining Satisfaction from the Outlaw's Lands.

How inquisition to find
 lands, &c.

If the inquest upon a *special capias utlagatum*, find the outlaw seised or possessed of lands, the different parcels, in whose tenure,

tenure, and of what annual value beyond reprises the same amount to, must all be set forth in the inquisition with convenient certainty. And then the prosecutor, by issuing writs of *levari facias* out of the Exchequer, for the sheriff to levy the profits, and on the return thereof, by suing out writs of *venditioni exponas* for selling those profits, and afterwards by petitioning to have the monies raised thereout paid to him in the manner before mentioned, may obtain a satisfaction for his debt, and costs of the outlawry.

But if the prosecutor's debt amounts to a considerable sum, and the outlaw has a *freehold interest* (a) in the lands, and does not come in and reverse the outlawry, and there is no incumbrance prior to the inquisition on those lands, then the prosecutor may obtain a *lease* of those lands out of the Exchequer, or a *grant* thereof under the *privy seal*. To obtain a lease, it will cost the prosecutor 25 *l.* or upwards; but such lease being cheaper than a grant under the *privy seal*, it has a preference to the other method of proceeding.

If the prosecutor would have a *lease* of the lands found by the inquest, he may obtain such lease by applying to the lords of the Treasury, stating (in the nature of a petition) the amount of his debt, the proceeding to outlawry, and the substance of the inquisition on the *capias utlagatum*.

On presenting this petition, the secretary will make out a warrant for a *particular* to the *remembrancer* of the Exchequer; whereupon the *deputy remembrancer* will certify a *particular* of the parcels of land, and value thereof, found by the inquest.

This *particular*, being signed by the *deputy remembrancer*, must be carried back to the secretary of the Treasury, who will thereupon grant a warrant for a lease, which is made out at the *Pipe-office* of the court of Exchequer.

When the prosecutor has obtained a lease, if the tenants of the lands will not attorn tenants to the lessee, and pay their rents to him voluntarily, he may sue out writs of *levari facias* from time to time, to levy the same as they become due; and when returned, the court of Exchequer, on motion and production of the lease, will order the sums levied, whether small or great, to be paid over to the prosecutor, or lessee, without any further application to the Treasury.

Under a *lease* or *levari*, the party may take the *issues* (b) and *profits* of the lands to the value extended, but neither

(a) A *freehold interest*, because a *chattel real*, as a term for years, may be sold by a *venditioni exponas*, but a *freehold* cannot; for an outlaw in civil cases does not forfeit his freehold lands, but only the profits thereof during his outlawry.

(b) What shall be accounted *issues*, vide the statute Westm. 2. c. 39. "And let the sheriff know that rents, corn in the grange, and all moveables, (except horse, harness, and household stuff,) be contained within the name of *issues*."

the king, nor his lessee, can plough the land, nor cut the wood or underwood upon it.

As to issues, the case of *Britton and Cole*, Salk. 395. Ld. Raym. 305. and Com. 51. is worthy of notice.

On a *levari facias* to levy the yearly value of 55*l.* found by the inquisition upon an *outlawry*, on a judgment in debt, the sheriff took the beasts of a stranger levant and couchant on the land. Trespass being brought, the sheriff justified under the *levari*. The court held, 1st, That by bare outlawry the party immediately forfeits his personal goods, and they are vested in the king; but he does not forfeit the profits of his lands, nor chattels real, till inquisition taken. And therefore that an alienation after outlawry, and before inquisition, is good to bar the king of the pernamcy; but if he makes a feoffment after inquisition, the feoffee has the estate, but the king shall have the profits. 2dly, That the sheriff may well take the cattle of a stranger levant and couchant, for they are the issues of the land, and the land is debtor: and if the law were otherwise, he might defeat the king of all by agisting the land; and there is better reason for their being liable in this case than for a rent-charge, which is against common right, and by grant of the tenant. 3dly, That if there be a commoner or another tenant in common with the defendant, his beasts may be taken on the lands, unless the title of the commoner, or tenant in common, be found by the inquisition; and so it is, of a lease for years prior to the outlawry, for they are bound by the inquisition; and so is their title, till they avoid it by a *monstrans de droit* brought in the Exchequer. 4thly, If issues be forfeited by a juror, and returned upon him, his feoffee is liable, nay, he in reversion is liable, if the juror was only tenant for life; for this being a service for the public, the inheritance itself is made debtor, and charged to answer it: otherwise, of the issues forfeited and returned upon an outlawry. The defendant, or his heirs, feoffee, or assigns, are liable, as claiming under the same estate which is charged with this debt, but it shall not charge him in reversion or remainder; for the forfeiture arises from a particular default of the tenant, and not from a charge on the inheritance.

The sheriff under a *levari*, or prosecutor by virtue of a lease, must not take more than the value *extended* by the inquest; but if the value is greater than found, a writ of *monstrans inquirendum* may go to find the full value; and such a writ may also go, if the inquisition is defective, and does not ascertain the outlaw's title, or the parcels of the lands sufficiently.

At what time
forfeiture of
lands by out-
lawry.

Cattle of stran-
gers on land
may be taken;

or commoners,
or tenants in
common.

To whom it
extends.

Plaintiff must
not take above
the value of
inquest.

Form of Petition for a Lease of an Outlaw's Lands, at the Suit of a Surviving Executor.

" To the Right Honourable the Lords Commissioners of his
 " Majesty's Treasury.

" The humble Petition of A. B. gent. surviving executor of
 " the last will and testament of C. D. merchant, deceased, Form of peti-
tion for a lease.

" Sheweth,

" That E. F. of in the county of esquire,
 " being indebted to your petitioner's testator in his lifetime,
 " by bond, in the penal sum of one thousand pounds of
 " lawful money of Great Britain, conditioned for the pay-
 " ment of five hundred pounds, with lawful interest for the
 " same, from the twenty-first day of May, which was in the
 " year of our Lord one thousand seven hundred and seventy-
 " eight; your petitioner, as executor of the last will and testa-
 " ment of the said C. D. deceased, did, at very great costs and
 " charges, in the month of October, which was in the year of
 " our Lord one thousand seven hundred and eighty, in due
 " manner, prosecute the said E. F. to outlawry; and by virtue
 " of a certain writ of special *capias utlagatum*, issued upon
 " the return of the writ of *exigi facias*, against the said E. F.
 " directed to the then sheriff of ; Q. P. esquire, then she-
 " riff of the said county of did return to the said writ of
 " special *capias utlagatum*, to him directed, an inquisition
 " taken at the dwelling-house of J. S. called or known by
 " the sign of the White Lion in in the said county, on
 " the second day of January, in the year of our Lord one
 " thousand seven hundred and eighty-one; by which it was
 " found, amongst other things, that the said E. F. the out-
 " law, on the said twenty-third day of October, in the year
 " of our Lord one thousand seven hundred and eighty, on
 " which day he was outlawed at the suit of your petitioner,
 " as surviving executor of the last will and testament of the
 " said C. D. deceased, was seized for the term of his natural life,
 " of and in all and singular the messuages, tenements, and heredita-
 " ments, with the appurtenances hereinafter particularly mention-
 " ed and expressed, being in the whole of the clear yearly value of
 " two hundred pounds of lawful money of Great Britain, beyond
 " all reprises; that is to say, of and in a capital messuage or
 " mansion-house, with the appurtenances, called and three
 " other messuages or dwelling-houses, with the appurtenances
 " thereunto adjoining, commonly called or known by the several
 " names of and also of one water corn grist mill, with
 " the appurtenances, called and also of and in two hun-
 " dred acres of arable, meadow and pasture land, or thereabouts,

"with the appurtenances; all which said premises were situate,
 "standing, lying, and being in the parish of _____ in the said
 "county; and were in the tenure, possession, or occupation of _____;
 "and that the said E. F. was, on the said twenty-third day of
 "October, seised of or entitled unto, in fee-simple, a free fishery
 "of and through a certain river called _____ in the parish
 "of _____ in the said county; and that the same was of the clear
 "yearly value of six pounds, beyond all reprises, and was then
 "set to _____ for that rent, as tenant thereof to the said E. F.
 "And that the said outlaw was not found in the bailiwick
 "of the said sheriff, as by the return of the said writ of
 "special *capias utlagatum*, now remaining of record in his
 "majesty's court of Exchequer, amongst other things, may
 "more fully and at large appear. And your petitioner fur-
 "ther sheweth unto your lordships, that the said outlawry
 "still remains in full force and effect, not vacated, super-
 "seded, reversed, or annulled; and that your petitioner's
 "said debt and interest, together with the costs and charges
 "which he has already necessarily been put unto, in prose-
 "cuting the said E. F. to outlawry, amount to a large sum
 "of money; that is to say, to the sum of _____ and up-
 "wards. By reason whereof, your petitioner hath been,
 "and is wholly prevented and hindered from administering
 "the effects of the said C. D. the testator, and fulfilling the
 "duty and trust reposed in him, as the surviving executor of
 "the said C. D. deceased. Wherefore your petitioner
 "humbly prays your lordships favour and interposition, that
 "by and with the consent of his majesty's attorney-general,
 "in this behalf obtained, a lease may be made to your peti-
 "tioner, by and from his majesty's court of Exchequer,
 "whereby your petitioner may be enabled to levy, take,
 "collect, and receive the issues and profits of the said out-
 "law's lands, tenements, and free fishery, so found by the
 "said inquisition, to the value thereof, respectively appraised
 "and extended, till such time as sufficient thereout shall be
 "made, collected, and levied, to satisfy your petitioner's
 "said debt, interest, costs, and charges; or until such time
 "as the said E. F. shall cause the said outlawry, so had in
 "due form of law against him, to be reversed or annulled.
 "And your petitioner, as in duty bound, shall ever
 "pray," &c.

Of the writ of
melius inqui-
rendum.

If the inquest should undervalue the land, or if all the
 outlaw's lands or effects should not be discovered at the time
 of taking the inquisition, or if there should be any defect
 in the return, a writ of *melius inquirendum* may go from
 the Exchequer; on which the sheriff must summon an-
 other inquest, and inquire more particularly, and return the

the inquisition, which he shall thereupon take, to the barons.

From what has been said, it is to be observed, that in a civil case an outlaw does not forfeit any lands, of which he has an estate of *freehold*; nor any thing of which the interest was *not vested* in him, nor the things which he has in *auter droit* as executor, administrator, or trustee, nor (as it seems) any *chose in action* not a specialty. For of freehold lands he only forfeits the *profits*: so that the king or his grantee, lessee, or party who obtains a *custodiam*, can only take the rent, corn, grass, or the like, which are profits; but cannot seize or plough the land, or demise it, nor cut the wood or underwood. In fine, as above observed, by an outlawry in a civil case, *personal chattels* may be said to be vested in the king by the *outlawry*; chattels *real* as a term for years, and the trust of a term and the profits of freehold lands (which he may take by *levari facias*), not till the *inquisition* has found them. And in all these the king may be said to have a *right*, and the party who prosecuted the outlawry an *interest in that right* for recovery of his debt, which the king ought to satisfy; but which is so entirely in the breast of the crown or its officers, that such satisfaction is to be regarded rather as a matter *de gratiâ* than *de jure*. And both this interest of the party and this right of the king are liable to be divested whenever the outlaw will come forth, reverse the outlawry, and submit himself to the laws of his country. Although *semb. contra* 5 Mod. 61. 2 H. 7. Imp. K. B. 519.

General explanation of effect of outlawry on property of the outlaw.

(E) Of the Appearance of Defendant upon the Exigent, or after Outlawry; and the Reversal thereof by Motion, or Writ of Error.

(E)

We have hitherto considered the proceedings in outlawry on the part of the plaintiff, upon the supposition, that the defendant does not appear, nor set aside or reverse the outlawry, by motion or writ of error; but, as in civil cases, outlawry is considered merely as a civil process, the defendant may, at any time, come into court, by putting the plaintiff in the same condition as he otherwise would have been, and so get rid of the outlawry.

He may, therefore, come in either, 1st, upon the exigent, and supersede that writ before the outlawry is completed; or, 2dly, he may appear *gratis*, or voluntarily upon the outlawry, and set it aside upon motion; or, 3dly, he may reverse the outlawry by writ of error.—We will consider each mode of proceeding in order,

(E. a) (E. a) Of superseding the Exigent before Outlawry.

How to be done.

Of the supersedeas;

when granted.

Nature thereof.

When to be delivered.

Defendant must pay costs.

How if defendant becomes a prisoner.

If the defendant has notice that an *exigent* is issued out against him, and would avoid the *outlawry*, he must find out to what sheriff the writ is directed, and get a note of it, particularizing at whose suit the cause of action, and when the *exigent* is returnable; from which note, the *filazer* in B. R. or *exigenter* in C. B. will make out a *supersedeas* on the defendant's attorney entering an appearance, provided the original action be notailable, or upon defendant's putting in special bail if it isailable. Burr. 1921. *Campbell v. Dady*; which *supersedeas* must be carried to the sheriff for his allowance thereof, before the return of the *exigent* (a).

The *supersedeas* is a writ taking notice of the *exigi facias* having issued, at whose suit, and for what cause; and orders the sheriff to forbear further proceedings, as the defendant duly appeared in court before the issuing thereof, and offered to answer the plaintiff; although the fact, perhaps, is the contrary.

The *supersedeas* to an *exigent* must be delivered to the sheriff before the return of the *exigent*. Barnes, 319.

In superseding the *exigent*, the defendant must pay the plaintiff the costs he has been put unto by his proceedings.

Proceedings on an *exigent post ca. fa.* were stayed on motion, defendant, after the *teste* and before the *return*, becoming a prisoner in the Fleet, and plaintiff left to charge him in execution. *Speed v. Barber*, Barnes, 321. So, *Heely v. Hewson*, Bar. 321.

How to enter Appearance, or put in Bail.

How to proceed if no bail required.

How to proceed if bail required.

If no bail required, and common appearance is entered with *filazer*, and a memorandum of warrant of attorney left with him, he will give his certificate, and a judge at chambers will make an order to reverse the *outlawry*.

If bail be required, it must be put in and perfected by two days notice exclusive being first given; or the bail may be put in at judge's chambers, and the above notice given of their justifying. *Filazer* attends with his book, and they justify, at the time and place appointed, as in common cases; then serve rule for the allowance, and get *supersedeas* from *filazer*.

You may move the court immediately, at the time of justification, for *outlawry* to be reversed, or afterwards, upon affidavit that bail have justified. It is always on payment of costs.

(a) Formerly, if the defendant superseded the *exigent* before *outlawry* pronounced, no bail was required, although the original debt was of an amount requiring bail; but now the practice is as above stated.

(E. b) Of

(E. b) Of the Defendant's coming in after Outlawry, and reversing it by Motion. (E. b)

A writ of error to reverse an outlawry in any civil case, is not often heard of now, as the party is allowed to come in and reverse by motion, and either satisfies the debt and costs, or justifies bail to appear to a new original; or, if special bail is not required, enters a common appearance; in which case the outlawry is reversed of course before a judge, or in court, by confession of some trifling error in the proceedings; as, the omission of any letter, irregularity in any of the process, want of proper addition, want of proclamation, want of filing the writ of proclamation, or, in short, any trifling matter whatever; which, in such cases, is usually confessed by the plaintiff. For, as the intent of proceeding to outlawry is answered, either by the payment of the debt and costs, or by having good bail put in to stand the event of the action, any objection to the reversal of the outlawry would be idle and nugatory.

Outlawry seldom reversed by writ of error, as it may be done by motion.

In order to reverse an outlawry, without an actual writ of error, the defendant's attorney (having entered an appearance) gets a copy of an exigent, on which is usually marked the error; which being pointed out to the secondary or prothonotary, and then shewn to one of the judges, if in court, or to a judge at chambers, a certificate is made thereof, if in court, or an order, if before a judge, to the clerk of the outlawries of the said reversal. — On sight of which order or certificate, the clerk of the outlawries marks the outlawry book, discharged; and then the reversal is drawn up in paper, and entered upon the roll, and the defendant is thereupon restored in statu quo prius.

How to proceed without writ of error if nothing done on the capias utlagatum.

This is the usual way where a person is outlawed, and neither his body, goods, or lands seized upon the *capias utlagatum*. But if his body, goods, or lands be seized, then his attorney must go to the clerk of the errors; and on putting in special bail, if requisite, he will make out a *supersedeas* to discharge the person or his effects, if taken, or if not taken, then for the sheriff to forbear. But if a man be outlawed after judgment, a reversal in the manner before mentioned will not be allowed; for an outlawry after judgment cannot be reversed till the plaintiff hath acknowledged satisfaction on record, or the defendant hath paid the money into court.

How if execution had been had on the capias utlagatum.

But the defendant must always pay costs on the reversal, unless the plaintiff has been intentionally irregular and oppressive, or clandestine in his proceedings.

But defendant must pay costs.

In C. B. it was moved, that the plaintiff might reverse an outlawry at his own charge, upon affidavit that the defendant was

Unless plaintiff has been grossly irregular.

was

was actually in the Fleet, in execution for the plaintiff in another suit, and that he knew it; and it was granted, because the plaintiff should have brought him to the bar by *habeas corpus*, and there have charged him with a new declaration. *Adlame v. Colebatch*, Salk. 495.

Motion that plaintiff might reverse an outlawry at his own expence, the defendant being in parts beyond the seas at the time he was outlawed. *Per cur.*—The defendant may take advantage of this by writ of error; but it is no matter of irregularity. *Blunt v. Beale*, Barnes, 320. *Ibid.* 319.

How and when
supersedeas
must be deli-
vered to sheriff.

The plaintiff having commenced a proceeding to outlawry against defendant, he gave notice to the plaintiff that he had appeared, and obtained a *supersedeas* to the *exigent*. Plaintiff searched at the Compter (as the outlawry was in London), and no *supersedeas* being allowed there, defendant was returned outlawed, who moved to set aside the outlawry. On shewing cause, defendant alleged, that he had entered an appearance with the *exigenter*; but that appeared to be unnecessary, and a novel imposition by the *exigenter*. The court held, that the *supersedeas* is in itself an appearance, if delivered to the sheriff before the return of the *exigent*; but that not having been done, the defendant is regularly outlawed; and the rule to shew cause, why it should not be reversed at the plaintiff's expence, was discharged. Barnes, 319. *Peach v. Wadland*.

Defendant may
enter appear-
ance by attor-
ney.
Stat. 4 & 5 W.
& M.

It was the practice in the Common Pleas, before the stat. 4 & 5 W. & M. c. 18. to allow a defendant, upon *appearance by attorney*, to reverse the *outlawry*, and not to require an *appearance in person*. But in the King's Bench, no one in any case, *civil or criminal*, could reverse an *outlawry*, without an *appearance in person*, till that statute, unless where, *ex specia gratia* upon a reason assigned to the court, they indulged him to appear by attorney, as in sickness, &c. Cro. Jac. 462.; but then the entry was, that he came in person, "*Quod venit in propria persona*," the law being clear, that upon an outlawry he ought to appear in person. *Vide* Carth. 7. Skin. 16. Salk. 496. But to remedy the inconvenience and expence attending an *appearance in person*, that statute enacts, "That no person who is or shall be outlawed in the said court, for any cause, matter, or thing whatsoever, (treason and felony only excepted,) shall be compelled to come in person into, or appear in person in the said court to reverse such outlawry, but shall or may appear by attorney, and reverse the same without bail, in any cases, except where special bail shall be ordered by the said court."

Outlawry

Outlawry had against a bankrupt reversed on motion. In what cases outlawry will be reversed or not: bankruptcy. Anon. 2 Crom. 50.

Rule to shew cause, why outlawry should not be reversed at plaintiff's expence. It appeared that two writs had been sued out, and defendant could not be arrested. He lived on the confines of Surry and Kent; and when the Surry bailiff came to arrest him, he jumped over an hedge into Kent, and put the bailiff to defiance. *Per cur.*—'Though the defendant is sworn to appear publicly, yet it is plain he kept out of the way to prevent being arrested. Rule discharged. But, by consent, the debt and costs to be paid out of the money in the sheriff's hands; and the overplus paid to the defendant. *Holman v. Brasfer*, Barnes, 320.

Rule to shew cause, why outlawry should not be reversed at the plaintiff's expence. Objected, on the part of the defendant, that he was a public visible man, and that the plaintiff had not endeavoured to arrest him. That the *capias*, *alias*, and *pluries*, were all sued out at the same time. That no affidavit of the debt was indorsed on the writs (though bailable), pursuant to the statute to prevent vexatious arrests. That no date was on the writs, as required by the statute. The affidavits, as to the defendant's visibility, were fully answered, and his total absconding proved. And the court held, that in case of a total absconding, no endeavours to arrest are necessary. That suing out the *capias*, *alias*, and *pluries* together, was regular, and warranted by constant practice. That on process to outlawry, no affidavit for bail is required by the statute, or the course of the court, nor is a date to such process usual. Rule discharged without costs. *Farnworth v. Smith*, Barnes, 322. *Dale v. Robinson*, Ibid.

So where the party is beyond sea, at the time of the commencement of the outlawry, if it appears that it is with a view of absconding and defeating his creditors, court will not reverse the outlawry on motion. *Asbly v. Stockwell*, Bar. 324. *Barclay v. Green*, Bar. 325.

But if defendant is abroad *bonâ fide* upon business, or the like; and, in other respects, is a public visible man, plaintiff cannot commence process of outlawry against him. *Reilly v. O'Conner*, Bar. 325.

But if defendant goes beyond sea, after the teste of an exigent, he may be regularly outlawed, 4 Roll. Abr. 84. Bar. 321. *Speed v. Barber*.

Where a *feme sole* has been waived, and afterwards marries, court will not set aside outlawry upon the husband entering a common appearance for himself and wife, the marriage being after the exigent. *White v. Dunster*, Bar. 321.

On

What affidavit
necessary of de-
fendant being
visible.

On motion to reverse an outlawry, the defendant, and three others, swore that he was always visible; but the court refused, and required positive affidavit, that he might have been served with process.

If no proclama-
tion, or return
thereof be de-
ficient.

If no proclamation was made according to statute, or if the return of the proclamation be insufficient, it may be a ground for reversing the outlawry; but more properly by writ of error than motion. *Dale v. Robinson*, Bar. 322. *Wiat v. Parker*, Bar. 323.

Of the death of
plaintiff, and
defendant's
bankruptcy af-
terwards.

A writ of *allocatur* on the *exigent* had issued (after judgment and *ca. fa.*), returnable the first return of Michaelmas, whereupon defendant was returned outlawed 16th of July preceding. It appeared, that the plaintiff died 6th of August, and that a commission of bankrupt issued against defendant on the 21st of August, preceding the return of the *exigent*. Defendant obtained a rule to shew cause why proceedings should not be stayed, which rule was discharged; the court being of opinion, that the writ and return must be filed, notwithstanding the plaintiff's death after the outlawry: before an actual assignment by commissioners of bankruptcy, the crown is not bound, though there is a great difference between an extent in *aid pro rege*, and an outlawry for a private person's debt. Here is no foundation to tie up the plaintiff's hands; the plaintiff (meaning the representative of the original plaintiff) may proceed if so advised. *French v. Mauby*, Barnes, 323.

(E. c)

(E. c) Of Reversing the Outlawry by Writ of Error.

In what cases
necessary.

The courts, instead of driving the party to his *writ of error* to reverse an outlawry had against him, will mostly, as appears from the foregoing cases, relieve him on motion, where the proceedings have been *irregular*; but in doing this, the court always require, that the defendant pay the plaintiff his costs up to the *exigent*, unless where the plaintiff has proceeded *intentionally irregular*, and with a view to oppress. But where the defendant is driven to his *writ of error* to reverse the outlawry, either upon coming in upon the *exigent*, &c. *gratis*, or brought in upon the *capias utlagatum*, he must, in all cases, pay the plaintiff his costs to the outlawry; and, where *special bail* is required, he must put in bail, either before error can be brought to reverse the outlawry, or else upon the reversal.

Of bail requir-
ed, and the con-
dition of their
recognizance.

By the 31 Eliz. c. 3. s. 3. it is enacted, "That before any allowance of any writ of error, or reversing any out-
lawry be had, by plea or otherwise, through or by want of

"any proclamation to be had or made, according to the form of this statute, the defendant and defendants in the original action shall put in bail, not only to appear and answer to the plaintiff in the former suit, in a new action to be commenced by the plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after allowing the writ of error, or otherwise avoiding of the said outlawry."

This statute requires bail to be put in before the allowance of error, only where the error is for want of proclamations. Stat. 31 Eliz.

But for any other cause than for want of proclamations, it is sufficient if bail is put in before the reversal of the outlawry by the writ of error, if the original cause of action required bail. Construction thereof.

As where error was brought to reverse an outlawry in Chester; to which the defendant in error pleaded, that no bail was put in before the allowance of the writ of error, according to the 31 Eliz. c. 3. *Per cur.*—This is no plea, for it is well enough, if bail be put in at any time before the reversal. The error was the want of *pro comitatu*. *Wilbraham v. Doyley*, Ld. Raym. 605. Of the time of putting in bail.

So where, pending error to reverse an outlawry on *mesne* process, the defendant in error moved to quash the writ, because no bail was given. *Sed per cur.*—That is never done till the outlawry is reversed; and then we take bail to appear to an original, to be brought within two terms. *Duckett v. Martin*, Str. 951.

The defendant was outlawed in a personal action, without any affidavit of the plaintiff's demand: and having brought error, he assigned his being beyond sea at the time of the outlawry; for which the court made no difficulty to reverse it: but the question was, upon what terms they should do it, the plaintiff insisting on special bail, and having now made a proper affidavit; and the defendant insisting to file common bail only.—The court, upon considering of the 4 & 5 W. & M. c. 18. s. 3. which empowers the outlaw to appear by attorney (as he did here), and says, it shall be reversed without bail in all cases but "where special bail shall be ordered by the court," declared, they were of opinion, they had a discretionary power to require it or not; and that the want of an affidavit before was no objection, because that is only requisite to warrant an arrest: and here was one in time for the new action that must be brought. And though the 31 Eliz. c. 3. s. 3. is the only act that requires bail, it is not to be inferred from thence, that in other cases it

How far court may exercise discretion.

it ought not to be insisted on; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation-money. *Sarocold v. Hampson*, Str. 1178. 1 Will. 3. Salk. 406.

Recognizance of bail is to pay condemnation, not to render.

The recognizance therefore, upon the *copias utlagatum*, should be always taken by the *filaxer's* clerk, according to 31 Eliz. to pay the condemnation-money. If it be taken in the usual way to *render* it will be bad, nor can the bail render in such case. *Borwick v. Parking*, East. T. 31 Geo. 3. *Philips v. Warburton*, Mich. T. 1785. Imp. K. B. 526.

If two defendants are outlawed, error to be brought in name of both

Two persons were outlawed in a joint action against them, and one moved, that, on filing common bail, she might have liberty to reverse the outlawry. *Sed per cur.*—The writ of error, to reverse the outlawry, must be brought in the name of both the parties that are outlawed; and, if one only appears, the other may be summoned and seivered, and then the outlawry may be reversed for the benefit of the party appearing only. *Symmons v. Bingoe and Cooke*, B. R. Salk. 496.

How to obtain writ of error, and of the proceedings thereon.

When a defendant, to reverse an outlawry, is obliged to sue out an *actual writ of error*, he must apply to the proper *curfitor* for the writ; who, on a *præcipe* given him, will make out the writ, which is to this effect:

Form of writ.

“ England, to wit. George the Third, by the grace of
 “ God, &c. To our justices *assigned to hold pleas before our-
 “ self*, greeting. Because in the record and proceeding, and
 “ also in the pronouncing the outlawry against C. D. late of
 “ London, merchant, in a plea of *trespass on the case*, whereon
 “ he is outlawed in London, pronounced before us returned,
 “ as it is said, a manifest error hath happened, to the great
 “ damage of him the said C. as by his complaint we have
 “ understood. We, being willing the error, if any hath
 “ been, should be duly corrected, and full and speedy justice
 “ done to the said C. in this behalf, command you, that if
 “ the outlawry aforesaid is returned before us, as it is said,
 “ then, the record and proceedings aforesaid being inspect-
 “ ed, you further cause to be done therein, for the error and
 “ vacating of the outlawry aforesaid, what of right, and ac-
 “ cording to the law and custom of England, shall be meet
 “ to be done.

“ Witness ourself at Westminster, this day of
 “ in the thirty-sixth year of our reign.”

When the writ of error is duly made out and sealed, the defendant must get it allowed by the court, on which allowance the *allocatur* is subscribed.

If the error is in the *exigent*, or *return*, or *allocatur*, or in the writ of *proclamation* or *return thereto*, (having first put in bail according to the statute,) or in any of the proceedings, defendant gets a copy thereof, and spreads the whole record, and assigns the errors in this manner:

"Afterwards, to wit, on next after
"in this same term, before the lord the king, at Westmin- Form of assign-
"ster, comes the said C. D. by ment of error.
"and immediately says, that in the pronouncing of the
"outlawry aforesaid, there is manifest error in this, to wit,
"that the return of the said writ of *exigi facias*, and also the
"said writ of *allocatur*, are insufficient, invalid, and void in
"law; therefore in that there is manifest error: there is
"error also in this, that no judgment of outlawry, upon the
"writ of *allocatur* aforesaid, is returned; therefore in this
"there is manifest error (and so on, assigning the error or
"errors, as they happen to be). And the said C. D. prays
"the writ of our lord the king, to warn the said A. B. to be
"before our lord the king, to hear the record and proceed-
"ings aforesaid. And it is granted to him," &c.

If the plaintiff does not appear and confess the errors, the defendant must sue out a *scire facias ad audiendum errores*, &c. and upon two *nihil*s returned, the court will reverse the outlawry of course; but if the plaintiff comes in voluntarily, or upon a *scire feci*, and does not confess the errors assigned, but joins in error, the defendant must make up *error books*, and proceed to argument and judgment, as in other cases of error: for which, see *post*, ch. xx. title Error.

(F) Of declaring after the Outlawry reversed or (F) superfeded.

Upon the reversal or superseding of the outlawry, if the defendant does not pay the plaintiff his debt and costs, the plaintiff must proceed to declare, the defendant having, upon reversing or superseding the outlawry, put in *special* or *common* bail, as the case required, to appear to a new original.

Of declaring af-
ter superfedas
or reversal.

Upon appearing and superseding the *exigent*, the plaintiff must declare within *six* or *eight* days after, otherwise the defendant may give him a rule to declare; and if no declaration comes in within the limited time, the defendant may nonsuit the plaintiff, and have his costs taxed. Compl. Soll. C. B. 84.

Within what
time to declare
after superfe-
deas or exigent.

So, if the defendant appear by *superfedas*, and will not take a declaration, the plaintiff may have judgment against him, by *nil dicit*. Ibid.

Within what time after reversal of outlawry.

Of the venue of such declaration.

Of the time of commencing such new action.

Of the bail in such new action according to 31 Eliz. c. 3.

But where a defendant outlawed causes the same outlawry to be reversed, the plaintiff has till the end of the second term after reversing the same, and notice thereof given, to declare in. But if he does not proceed within two terms next after notice of reversing the outlawry, the defendant shall have his costs to be taxed. Reg. Tr. 33 Car. 2. C. B.

The declaration, after reversal, or superseding of the outlawry, has no need to be laid in the same county in which the former original was made. So held on demurrer. 3 Lev. 245. *Whitwick v. Howenden*. Where the original and outlawry were in London, and on the reversal of the outlawry, the plaintiff declared in Suffex: on which it was insisted, that the original being laid in London, the plaintiff could not declare in the action in another county, though the cause of action was transitory. But the *prothonotarius* certifying, that the course of the court was, that although the original be laid in London, for expediting the outlawry, yet when the defendant comes in, the plaintiff may declare against him in any other county, be the action local or transitory; and the stat. 21 Jac. 1. c. 16. s. 4. giving the plaintiff generally a power to commence a new action or suit within a year after the outlawry reversed; the plaintiff may do it in this case, to warrant his declaration delivered within the course of the court. And the plaintiff had judgment.

By the 21 Jac. 1. c. 16. s. 4. it is enacted, "That if in any action brought by the original, the defendant be outlawed, and shall after reverse the outlawry; that then the plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment of outlawry reversed, and not after."

A new original therefore is to be sued out.

And by the 31 Eliz. c. 3. s. 3. it is enacted, "That before the allowance of any writ of error, or reversing of any outlawry be had by plea or otherwise, through or by want of any proclamation to be had or made according to the form of the said statute, the defendant in the original shall put in bail, not only to appear and answer to the plaintiff in the former suit, in a new action to be commenced by the said plaintiff for the cause mentioned in the first action (a), but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after the

(a) On this statute it is, that *case* will lie for the party against the sheriff, for an escape upon an outlawry on *meine process*: for though the party is in custody merely at the suit of the king, and the plaintiff has no interest in his body, yet he cannot have his outlawry reversed without security first given to appear to a new original. Fitzg. 265. Cro. Eliz. 652, S. P.

"allowing

"allowing the writ of error, or otherwise avoiding of the said outlawry."

Though this latter statute relates only to the reverſing the outlawry through want of *proclamation*; and diſcharges the bail in ſuch caſe given, if the plaintiff does not proceed within *two terms* after the reverſal; yet the recognizance of bail, upon the reverſal of outlawry for other cauſes than for want of proclamations, has moſtly been taken ſince the making thereof according to this ſtatute. Therefore, if the plaintiff does not declare after the reverſal of the outlawry within *two terms*, the bail are diſcharged. But though they are diſcharged from their recognizance, the plaintiff is not barred of his action, provided he commences the ſame within a year after the reverſal of the outlawry, according to the 21 Jac. I. c. 16. *ſupra*.

Conſtruction of the ſtatute.

Bail upon the reverſal of outlawry cannot render their principal in diſcharge of themſelves; for they are abſolutely bound to pay the condemnation-money.

Bail cannot render.

Defendant was outlawed on a ſpecial original, and upon reverſing the outlawry, put in bail, with condition as uſual, to appear to a new original, to be filed within two terms. Plaintiff proceeded to judgment, and defendant brought a writ of error; a motion was made on behalf of the bail, to diſcharge their recognizance, no original having been filed within the two terms; and a rule made to ſhew cauſe, which was diſcharged. The bail may plead as they ſhall be adviſed. *Carleton v. Wilkinſon*, Barnes, 86.

How if no original filed within two terms.

Upon ſuperſeding the exigent, if plaintiff delivers a declaration, there ſhould be a notice to plead; and a rule given to plead; before judgment for want of a plea can be ſigned. And defendant has, in ſuch caſe, the ſame time to plead as in other caſes. Barnes, 271, 272.

Of the notice to plead, and ſubſequent proceedings.

(G) Of Reſtoration after Outlawry reverſed or determined.

(G).

Every outlawry determines upon the death of the party outlawed; and if the party was outlawed on a civil ſuit, the representatives of the outlaw ſhall have a reſtoration of the lands ſeized, or effects, if they remain in the ſheriff's hands not diſpoſed of; whereas in *criminal* caſes outlawry works an entire forfeiture of the outlaw's eſtate, both *real and perſonal*.

Outlawry determined by the death of the defendant.

In order to reverſe an outlawry on death, there muſt be certificate from the miniſter of the pariſh, where the party died or was buried; and likewise an *affidavit* of his death, by ſome perſon that was acquainted with him, and was preſent

Of the affidavit in ſuch caſe.

at the death or burial, in which *affidavit* the party should be described as in the outlawry.

How such death to be pleaded.

But though *outlawry* determines upon the death of the outlaw, yet before the king's hands can be removed from the lands or goods seized, such death must be pleaded, and judgment entered up thereon in the Exchequer, upon the plea being confessed by the attorney general. And in like manner, if the outlawry is reversed (which must be done in the original court where the action was brought) for any other reason, a *certificate* of such reversal from the clerk of the outlawries must be pleaded and confessed, and judgment entered up thereon in the Exchequer before the king's hands can be removed.

How to proceed in other cases of reversal of outlawry.

Form of suggestion.

These proceedings are in the nature of a *suggestion upon the roll* in the court of Exchequer.—The judgment by the barons in such case is, “That his majesty's hands be removed from the possession of the premises in the inquisition mentioned; and that the said A. B. (the representative or outlaw, as the case is) be restored to his possession thereof, together with the rents, issues, and profits thereof, which have not as yet been answered to his said majesty; and that the said lease, in form aforesaid made, be void and of no effect (a); and that, as well the said R. S., late sheriff of the county of _____ as all others who have been, now are, or hereafter shall be sheriffs of the said county, shall be discharged in their accounts towards his said majesty, his heirs and successors, as well of the rents and profits of the said premises, as of the said annual rent of _____ which have not been answered his said majesty; and lastly, that the said A. B., as to the said premises, may be dismissed the court, by reason of the said confession, and other the premises.”

Subsequent proceedings.

The plea may be put in by any person: for though the judgment is, that he shall be restored to the possession of the premises, yet it gives no title to the lands.

In order to discharge the sheriff, the judgment-roll must be carried to the *pipe-office*, that a *quietus* may be made thereupon.

Of the writ of *amoveas manus*.

If after such judgment any difficulty attends the getting possession, a writ of *amoveas manus* must be sued out of the Exchequer, directed to the sheriff, who will thereupon deliver possession.

A merchant having 500*l.* stock in the India company, was outlawed before judgment at the suit of W. R. The king, after inquisition and seizure, upon petition, granted the 500*l.*

(a) In case a lease has been granted by the Exchequer.

stock

stock to the said W. R. and that he might sue for it in his name. W. R. thereupon got the stock transferred to him, and then the merchant reversed the outlawry, and obtained restitution *de omnibus quibus nobis non est responsum*. And on question, whether he should have the stock back? the court held that W. R. should not restore it, because the grant was executed and vested in W. R.; and as to that matter the king was answered. *Vide 2 Lev. 49.*

A sheriff's officer being in possession of a tenant's effects under an outlawry made a distress for rent, sold the goods so distrained, and afterwards the outlawry was reversed; it was ruled that the officer was liable to pay the produce of the goods to the landlord in an action for money had and received. The goods of a tenant are liable to a year's rent, notwithstanding an outlawry in a civil suit. *St. John's College v. Murcott*, 7 D. & E. 259.

(H) Of Outlawry after Judgment.

(H)

If the original proceedings were by special original, plaintiff may proceed to outlaw defendant after judgment obtained, if he cannot be taken on the *ca. sa.*; which must first be sued out in the usual way, into the same county where the action was laid, & *non est inventus* returned thereto by the sheriff, upon which the *filazer* will make out the *exigent*; and upon that being delivered to the under-sheriff, and returned as other *exigents*, the *filazer* will then make out a general or special *capias utlagatum* into as many several counties as you will, either in England or Wales. The *exigent* may be had immediately upon the return of the *ca. sa.* without any *alias* or *pluries*, and also without a writ of proclamation. *Cro. Jac. 677.*

Proceedings in such case.

The advantages of this proceeding to outlawry after judgment are: that if the defendant moves from county to county, to avoid being taken, you may take out, at once, as many writs of *capias utlagatum* against him as you please; and this at a moderate expence; whereas, in common cases, you cannot regularly have execution against him in above one county at a time.

Advantage of such proceeding to outlawry.

It also saves the charge of reviving a judgment by *scire facias* after the year and day have expired.

If the defendant be taken on the *capias utlagatum*, he cannot be discharged without reversing the same for error, or making plaintiff satisfaction.

Defendant was outlawed after judgment, and taken by a *capias utlagatum*; on motion to set aside the *capias utlagatum*, because the judgment of outlawry appeared to be entered

Of receiving judgment of outlawry on defendant's death.

after plaintiff's death, and that the *capias utlagatum* had issued without a revival of the judgment by *scire facias*, by plaintiff's executors, rule was made absolute. *The King v. Manby*, Bar. 325.

SECTION V.

Of Prohibition.

Nature of the remedy.

To what courts it extends.

In what cases granted.

Other grounds for granting it.

The writ of prohibition is a remedy provided by the common law against the encroachment of jurisdiction, or the calling of a person to answer in a court that has no legal cognizance of the cause. 3 Blac. Com. 111. It is a writ directed to the judge and parties of a suit in an inferior court, commanding them to cease from the prosecution thereof, upon a suggestion, that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. Not only the inferior courts of common law, as the courts of the counties palatine, or principality of Wales, if they hold plea of land, or other matters not lying within their respective franchises; and the county courts, or courts baron, if they hold plea of any matter of the value of 40 s.; but also all other inferior courts; as, the ecclesiastical courts, the university courts, the court of chivalry, the court of admiralty, the court of prize, and courts martial, whether naval or military, are liable to the controlling authority which the courts of Westminster-hall have, from time to time, exercised for the purpose of preventing their exceeding the jurisdiction given to them; the general ground of prohibition being an excess of jurisdiction when the court assumes a power to act in matters not within its cognizance. *Grant v. Sir Charles Gould*, 2 H. Blac. 100. As if the court ecclesiastical should attempt to try the validity of a custom pleaded; or a suit for breaking open a chest in a church, and taking away title-deeds to the advowson, 3 D. & E. 351.; or the admiralty court should presume to try a contract made, or to be executed, within this kingdom.

Also, if in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England; as where they require two witnesses to prove the payment of a legacy, a release of tithes, or the like; in such cases, a prohibition will be awarded; for, as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessory to some original

ginal question clearly within their jurisdiction; it ought, therefore, where the two laws differ, to be decided, not according to the spiritual, but the temporal law, else the same question might be determined different ways, according to the court in which the suit is depending; an impropriety which no wise government can or ought to endure, and which is therefore a good ground of prohibition. And, if either the judge, or the party, shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it; and an action will lie against them, to repair the party injured, in damages. 3 Blac. Com. 112.

Another ground or species of prohibition is, where an act has passed with respect to any authority resident in other courts, as in the *ecclesiastical* court, in which there is an inherent jurisdiction. In such a case the courts of Westminster-hall have conceived, that where the authority is limited by an act of parliament, the court which acted differently from the prescription of the act was, in that instance, exceeding its jurisdiction, and, therefore, liable to a prohibition. *Grant v. Sir Charles Gould*, 2 H. Blac. 100. For the late decisions respecting the prohibitions to the *ecclesiastical* courts, see *Darby v. Cozens*, 1 D. & E. 552. *Bishop of Chichester v. Hayward*, 1 D. & E. 659. *Carshal v. Mapledoram*, 2 D. & E. 473. *Gardner v. Parker*, 3 D. & E. 551. To the admiralty court, *Mentone v. Gibbons*, 3 D. & E. 267. *Smart v. Wolf*, 3 D. & E. 323. *Velthafen v. Ormsley*, 3 D. & E. 315. To the prize court, *Lord Camden v. Home*, 3 D. & E. 382. 1 H. Blac. 476. *Bayner v. Atkins*, 1 H. Blac. 164. To the court martial, *Grant v. Sir Charles Gould*, 2 H. Blac. 100.

Different cases
on the subject.

The proceedings in prohibition are briefly as follows:—The party aggrieved applies to the superior court, setting forth, in a suggestion upon record, the nature and cause of his complaint, in being drawn *ad aliud examen* by a jurisdiction, or manner of process disallowed by the laws of the kingdom; upon which, if the matter alleged appears to the court to be sufficient, the writ of *prohibition* immediately issues, commanding the judge not to hold and the party not to prosecute the plea; but sometimes the point may be too nice and doubtful to be decided merely upon a motion, and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare in prohibition*; that is, to prosecute an action, by filing a declaration against the other, upon a supposition or fiction (which is not traversable) that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if

History of the
proceedings.

upon demurrer and argument the court shall finally be of opinion, that the matter suggested is a good and sufficient ground of prohibition in point of law, then judgment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior court, shall be prohibited from proceeding any further. On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him when he applies for the prohibition in the court above, and a *writ of consultation* shall be awarded, so called, because, upon deliberation and consultation had, the judges find the prohibition to be ill founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined in the inferior court. And, even in the ordinary cases, the writ of prohibition is not absolutely *final* and conclusive. For, though the ground be a proper one in point of law, for granting the prohibition; yet, if the fact that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction. If, for instance, a custom be pleaded in the spiritual court, a prohibition ought to go, because that court has no authority to try it: but, if the fact of such a custom be brought to a competent trial, and be there found false, a writ of consultation will be granted. For this purpose the party prohibited may *appear* to the prohibition, and take a declaration, (which must always pursue the suggestion,) and so plead to issue upon it, denying the contempt and traversing the custom upon which the prohibition was grounded: and, if that issue be found for the defendant, he shall then have a writ of consultation. The writ of consultation may also be, and is frequently granted by the court without any action brought; when after a prohibition issued upon more mature consideration, the court are of opinion that the matter suggested is not a good and sufficient ground to stop the proceedings below. Thus careful has the law been, in compelling the inferior courts to do ample and speedy justice; in preventing them from transgressing their due bounds; and in allowing them the undisturbed cognizance of such causes as by right, founded on the usage of the kingdom or act of parliament, do properly belong to their jurisdiction. 3 Blac. Com. 113.

We now proceed to consider:

(A) From what Courts, and in what Stage of a Suit the Writ of Prohibition may issue.

(B) Of the Suggestion.

(C) Of

(C) Of proving the Suggestion, and entering such Proof according to Stat. 2 & 3 Edw. 6.

(D) Of verifying the Suggestion by Affidavit.

(E) Of granting the Prohibition.

(F) Of declaring in Prohibition.

(G) Of the Writ of Consultation.

(H) Of granting Prohibition after Consultation awarded.

(I) Of Disobedience to Writ of Prohibition.

(A) From what Courts Prohibition may issue, and at what Stage of the Suit.

(A)

The superior courts at Westminster, having a superintendency over all inferior courts, may, in all cases of innovation, &c. award a prohibition: in this the power of the King's Bench has never been doubted. F. N. B. 53. 4 Inst. 71.

Jurisdiction in cases of prohibition of K. B.

Also the court of Chancery may award a prohibition, which may issue as well in vacation as in term time; but such writ is returnable into B. R. or C. B. Bro. Proh. pl. 6. 4 Inst. 81. Will. Rep. 43.

Of Chancery.

As the common law courts are not always open, if one is sued in an inferior court for a matter out of the jurisdiction, the defendant, if it happen in *vacation time*, when only the Chancery is open, may move that court for a prohibition: but then it must appear by *oath* made, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused; and if a prohibition has been granted out of Chancery *improvidè*, or without these circumstances attending it, the court will grant a *superfedeas* thereto. Will. Rep. 426. pl. 135.

Whence writ may issue in vacation.

As the jurisdiction of the court of Common Pleas is founded on *original writs* out of Chancery, it was formerly doubted whether it could, without count or plea depending therein, award a prohibition: but it has been determined by the unanimous sense of all the *judges*, that this court may, upon a suggestion, grant prohibitions, to keep as well *temporal* as *ecclesiastical* courts within their bounds and jurisdictions; and that without any *original writ* or *plea* depending: the common law being in these cases a prohibition of itself, and standing instead of an *original*. Bro. Proh. pl. 6. Noy, 153. 12 Co. 58. 108. 4 Inst. 99. 2 Brownl. 17. Vaughan, 157.

Of Common Pleas.

Of grand sessions in Wales.

The grand sessions in Wales may also send a prohibition, and write to the spiritual courts there, as well as the courts here may. Sid. 92. *Sed vide* Cro. Car. 341. Jones, 330. Vaugh. 411.

Difference in this respect between B. R. and C. B.

Of the suggestion in C. B.;

In B. R. and C. B. this difference hath been made; that in B. R. a prohibition may be awarded upon a bare surmise without any suggestion on record; but that for a prohibition out of C. B. there must be a suggestion on record; and therefore the latter is considered as the suit of the party, and in which he may be nonsuited, and is not discontinued by the demise of the king; but the former is only in nature of a commission prohibitory, which is discontinued by the demise of the king. Noy, 77. Palm. 442. Latch. 114. But if an attachment issues upon such prohibition, or the party puts in *bail*, then it becomes a private suit, not discontinued by the demise of the king; and after such proceeding the party may be nonsuit, but not before. Palm. 423. Latch. 114.

and in B. R.

But *per* Holt, Ch. Just. B. R. a prohibition cannot be moved for, if it be insisted, till the suggestion be entered on record. Salk. 136.

So, for want of a suggestion on record, the court of B. R. discharged the rule to shew cause why a prohibition should not be awarded. *Hawkins*, assignee of *Wooldridge*, a bankrupt, against *Blaquire and others*, assignees of *Sampson*, Hil. 20 Geo. 3.

Granting prohibition is discretionary.

It hath been said, that the granting a prohibition is *ex debito justitiæ*; but the better opinion seems to be, that the awarding a prohibition is a matter *discretionary*, i. e. that from the circumstances of the case, the superior courts are at liberty to exercise a legal discretion herein, but not an arbitrary one in refusing prohibitions, where in such like cases they have been granted, or where by the laws and statutes of the realm they ought to be granted. Salk. 33. pl. 6. Ld. Raym. 220. 578. 586.

Of the writ of error thereon.

It hath been determined in the house of lords, that no writ of error will lie upon the refusal of a prohibition; but when a consultation is awarded, it is with an *ideo consideratum est*, and then a writ of error will lie, because there is a judgment. Ld. Raym. 545. Salk. 136.

There must be suit depending to warrant prohibition;

No prohibition can be had, unless the party is in danger by some suit actually depending; and therefore a prohibition cannot be granted before a libel, or appearance to a suit below, Salk. 35. pl. 8. March. 24, 25.; for a prohibition *quia timet* does not lie. Allen, 36.

and court must proceed to try extra-judicially;

So, where the subject of a suit in an inferior court is within the jurisdiction of that court, though in the proceedings

ings a matter be stated which is out of the jurisdiction, yet unless the court is going on to try such matter, a prohibition will not lie. *Dutens clerk v. Dobson*, 1 H. Blac. 100.

Or where matters triable at common law arise incidentally in a cause, and the ecclesiastical court has jurisdiction in the principal point, the court will not grant a prohibition to stay trial unless they proceed to try contrary to the course of the common law. *Full v. Hutchins*, Cow. 424.

It is clearly agreed, that in all cases where it appears upon the face of the libel, that the admiralty or spiritual court, &c. have not a jurisdiction, a prohibition may be awarded, and is grantable *as well after as before sentence*; for the superior courts are to take care that the inferior courts keep within their due bounds. 2 Inst. 602. 2 Roll. Abr. 318. Noy, 137. Sid. 65. Cro. Eliz. 571. Moor, 462. 907. Carth. 463. Skin. 299. pl. 2. But *after* sentence a prohibition shall not go, unless the want of jurisdiction in the court below appears upon the face of the proceedings. Burr. Rep. 2036. 2040. *Leman v. Gouty*, 3 D. & E. *Blaquire v. Hawkins*, Doug. 378.

or against the rules of law.

When prohibition may be granted before, and when after sentence.

Where a modus is pleaded in an ecclesiastical court, a prohibition may be granted any time before final sentence. *Darby v. Cozens*, 1 D. & E. 552.

In case of a modus;

If the spiritual court hath cognizance of part of the charge only and not the rest, the court after sentence below will not grant a prohibition. *Carlsake v. Mapledoram*, 2 D. & E. 473.

or if the court hath cognizance only in part.

And although a prohibition lies *after* sentence, where it appears on the face of the proceedings that the ecclesiastical court hath no cognizance of the cause; yet it is otherwise, if there be only a defect of trial. As where the plaintiff has grounded his libel on a custom, he shall not, after it is found against him, obtain a prohibition. *Full v. Hutchins*, Cow. 422.

Not granted after sentence if only defect of trial.

So that in such case the party must apply before sentence; for if he submits to trial he is afterwards too late. *Ibid.*

A prohibition will be granted to a court of appeal, where it appears that they have no jurisdiction over the subject-matter, even after they have remitted the suit to the court below, and awarded costs against the appellant, and though the party applying for a prohibition appealed to that court. *Darby v. Cozens*, 1 D. & E. 552.

When granted to a court of appeal.

(B) Of the Suggestion for a Prohibition.

(B)

Where the court has a natural jurisdiction of the thing, but is restrained by some statute, as by 23 Hen. 8. for not citing out of the diocese, there the party must come before sentence;

When party must apply.

sentence; for after pleading and admitting the jurisdiction of the court below, it would be hard and inconvenient to grant a prohibition. *Vide* the authorities *antea*, and Cro. Car. 97. 2 Show. 145. pl. 153. 155, &c. 2 Salk. 543. pl. 1. Ld. Raym. 27. Salk. 30. Carth. 33.

Suggestion,
what.

Proceedings
thereon.

When a prohibition is moved for, the method is for the party to file a *suggestion* in court, stating the proceedings that have been had in the court below, and then suggesting the reason why he prays the prohibition; and upon this the court grants a rule to shew cause why a prohibition should not issue; and if upon shewing cause it appears to the court that the surmise is not true, or not clearly sufficient to ground the prohibition upon, they will deny it; otherwise they will make the rule absolute for a prohibition; or if the matter be doubtful, they will order the party to declare. *Hob. 67.*

The court will not grant a prohibition the last day of term, but on motion a rule may be obtained to stay proceedings till the ensuing term. Latch. 7. 2 Rol. Rep. 456.

The form of a suggestion for a prohibition to the *bailiff* of a borough, to prohibit him from holding plea in a matter arising *extra jurisdictionem*.

The suggestion for a prohibition is to the following effect:

Form of suggestion for prohibition to bailiff of a borough to prohibit him from holding plea in a matter not within his jurisdiction.

“ Great Britain. Be it remembered, that on
“ next after fifteen days of Saint Martin, in this same term,
“ before the lord the king at Westminster, comes A. B. in
“ his proper person, and giveth the court of our lord the
“ king here to understand, that *whereas* by a certain act of
“ parliament, made at a parliament holden at Westminster
“ the twenty-fifth day of April, in the third year of the
“ reign of the late king Edward the First, it was (amongst
“ other things) ordained and established by the authority of
“ the same parliament, ‘ Of great men and their bailiffs,
“ and other (the king’s officers only excepted, unto whom
“ especial authority is given) which at the complaint of
“ some, or by their own authority, attack others passing
“ through their jurisdiction with their goods, compelling
“ them to answer afore them upon contracts, covenants, and
“ trespasses, done out of their power and their jurisdictions,
“ where indeed they hold nothing of them, nor within the
“ franchise, where their power is, in prejudice of the king
“ and his crown, and to the damage of the people; it is
“ provided, That none from henceforth so do; and if any
“ do, he shall pay to him, that by this occasion shall be at-
“ tached, his damage double, and shall be grievously
“ amerced to the king,’ as by the statute (amongst other
“ things)

“ things) it more fully appears : nevertheless, one C. D.
 “ not ignorant of the premises, but contriving and intend-
 “ ing the said A., against the form of the statute, unjustly
 “ to vex, oppress, and weary, and to draw him into plea
 “ in the court of our lord the king, of record, of the
 “ borough of Bridgenorth, in the county of Salop, held
 “ in the said borough, before the bailiff of the said borough,
 “ in a certain action which had arisen and accrued out of
 “ the jurisdiction of that court; and also the common law
 “ of the realm (to every subject of right due) to derogate
 “ from and abridge, and the due course of law to subvert,
 “ and the issues and profits which to the said lord the pre-
 “ sent king thereof might happen, and which to his royal
 “ crown especially belongeth to diminish, in the said court
 “ of our said lord the present king, of record there, held on
 “ in the thirty-fifth year of the reign of the lord
 “ the present king, before the bailiffs of the said borough,
 “ according to the custom of the said borough, from time
 “ whereof the memory of man is not to the contrary, used
 “ and approved, levied his certain plaint against the said A.
 “ in a certain plea of trespass upon the case, to the damage
 “ of the said C. D. of fifty pounds, and the said C. D. by
 “ pretence of the plaint aforesaid, in form aforesaid levied
 “ and affirmed, then and there caused and procured him the
 “ said A., passing within the jurisdiction of that court, to be
 “ attached and arrested, and compelled the said A. to appear
 “ in the said court, and the said A. of and upon the pre-
 “ mises unjustly constrained to answer. And thereupon in
 “ the same court, held on the day of
 “ in the thirty-fifth year of the reign aforesaid, before the
 “ said bailiffs of the said borough, the said C. D. upon his
 “ aforesaid plaint did declare against the said A. in manner
 “ and form following; that is to say, C. D. complains
 “ against A. B. (*here insert the declaration*), &c., which
 “ said plaint now remains in the said court depending and
 “ undetermined, and there in the said court is prosecuted by
 “ the said C.—“ *Whereas*, in truth and in fact, the aforesaid
 “ cause of action in the said plaint and declaration mention-
 “ ed, arose and accrued to the said C. D. out of the said bo-
 “ rough of Bridgenorth, and out of the jurisdiction of that
 “ court; that is to say, at the parish of in the
 “ said county of Salop, and not within the said borough of
 “ Bridgenorth, or within the jurisdiction of that court :
 “ And whereas the said A. holds nothing of them the said
 “ bailiffs, or within the franchise or jurisdiction of that
 “ court : And whereas in fact the bailiffs of the said bo-
 “ rough, or any of them, never had, or hath power to hold
 “ the

“ the plea aforesaid, nor to hear and determine the said plea
 “ as aforesaid, arising and accruing out of the jurisdiction of
 “ the said court, by the laws of this realm, nor by virtue of
 “ any letters patent of the said lord the present king, nor
 “ any of his progenitors or predecessors, kings or queens of
 “ this realm, nor by any title of prescription, from time
 “ whereof the memory of man is not to the contrary used
 “ and approved, or any otherwise howsoever; “ *and although*
 “ *the said A. all and singular the matters and things by him*
 “ *above suggested, hath pleaded in his discharge in the aforesaid*
 “ *court (a) before the aforesaid bailiff of the said borough,*
 “ and there offered to verify and prove the same by undeniable
 “ testimony and proof; *nevertheless,* the bailiffs of the
 “ borough aforesaid, the aforesaid plea and allegation of the
 “ said A. there to receive or admit altogether refused, and
 “ threatened to give judgment in the said court, in the said action,
 “ against the said A. in contempt of our lord the present
 “ king, and to the great damage of the said A. and contrary
 “ to the law of this realm, and also against the form of the
 “ statute aforesaid; and this the said A. is ready to verify;
 “ *Whereupon* the said A. humbly imploring the aid and munificence
 “ of the court of our lord the present king, prays speedy
 “ remedy, and a writ of our lord the present king of prohibition
 “ to be directed to the said bailiffs of the said borough,
 “ and other competent judges in that behalf; and also to
 “ the said C. his counsellors, attornies, and solicitors, in this
 “ behalf whomsoever, to prohibit them and every of them,
 “ that they, or any of them, in the said plea of trespass, in
 “ any manner touching the same in the said court, before
 “ the said bailiffs of the said borough, or any of them, to
 “ proceed should not presume, nor any farther in that behalf
 “ should attempt, which to the further derogation of the
 “ crown of his present majesty, or to the contempt of the
 “ law, or the loss or prejudice of the said A. might in any
 “ wise turn, on pain of incurring the punishment due to
 “ violators of the law of this realm; but from all further
 “ prosecution against the said A. in the said court, before
 “ the bailiffs of the said borough, or any of them, should utterly
 “ desist, and each and every of them should desist;
 “ and it is granted to him,” &c.

The form of a suggestion for a prohibition to an *ecclesiastical* court on a libel there by a vicar against a parishioner for

(a) *Notes.* Where there is no *defectus jurisdictionis*, but only *triationis*, the defendant must plead it below, and have his plea disallowed, before he can be entitled to a prohibition. But where there is a *defectus jurisdictionis*, the party has no occasion to plead it below before motion for prohibition. Therefore, in the above precedent, given of a suggestion, there was no occasion for that part of it.

a sub-

a subtraction of tithes, setting forth that there is a *modus* in the said parish, &c.

“ England. - Be it remembered, that on next
 “ after days from the day of Easter, in this same Form of sug-
 “ term, before our lord the king at Westminster, comes hibition for pro-
 “ A. B. by his attorney, and gives the court hibition to an
 “ here to understand and be informed, that *whereas* all and ecclesiastical
 “ all manner of pleas of and concerning any prescriptions court, in a mat-
 “ and customs whatsoever within this realm, and the cogni- ter of tithes,
 “ zance of such pleas, belong and appertain to the said lord where there is a
 “ the king, and his royal crown, and to the common law, *modus set up.*
 “ and in the courts of our said lord the king of record,
 “ ought and have always been accustomed to be tried and
 “ discussed, and not in any ecclesiastical court: And *whereas*,
 “ on the 1st day of January 1795, the said A. B. was, and
 “ from thence hitherto hath been, and still is, seised in his
 “ demesne as of fee, of and in divers, to wit, thirty, acres
 “ of meadow, situate, lying, and being within the parish of
 “ in the county of and within the
 “ bounds, limits, and tithable places thereof; and during
 “ the time aforesaid was possessed of divers cows and
 “ calves within the said parish, and the bounds, limits, and
 “ tithable places thereof: And *whereas* within the said
 “ parish there are, and from time whereof the memory of
 “ man is not to the contrary, have been, certain customs and
 “ modes of tithing, that is to say, one certain custom, &c.
 “ (*inserting the customs and moduses, &c.*); nevertheless, one
 “ C. D. clerk, vicar of the parish of afore said,
 “ not ignorant of the premises, but contriving unduly to
 “ aggrieve and oppress the said A. B. against the due course
 “ of the law of this realm, and to draw the cognizance of
 “ a plea which belongs to our lord the king's temporal
 “ courts, and ought there to be tried, discussed, and deter-
 “ mined, to another trial, on the day of
 “ 1795, drew the said A. B. into a plea, and caused him to
 “ appear in the court Christian, before the right worshipful
 “ J. C. master of arts, vicar general, and principal of the
 “ episcopal or consistorial court of lawfully con-
 “ stituted, his surrogate, or some other competent judge in
 “ that behalf, by craftily and subtilly libelling against the
 “ said A. in the said court Christian—First, that in the year,
 “ &c. (*state the libel*); and although the said A. hath al-
 “ leged and pleaded all and singular the matters above sug-
 “ gested and alleged in the said court Christian, in his dis-
 “ charge of and from the tithes, &c. and offered to prove
 “ the

“ the same by indisputable evidence; yet the aforesaid spiritual judges have altogether refused, and still do refuse, to admit or receive the same plea, allegation, or proof, and endeavour with all their might to compel the said A. to pay the said monies in the aforesaid libel specified, and daily threaten to condemn the said A. of and upon the premises, in contempt of our said lord the king and his laws, to the great damage and injury of the said A. and against the course of the law of this realm, and the customs and prescriptions aforesaid; all which said premises the said A. is ready to verify and prove, as the court of our lord the king here shall direct: *Wherefore* the said A. imploring the aid and assistance of this court here, prays relief, and his majesty's writ of prohibition to be directed to the said official principal of the episcopal consistorial court of aforesaid, his surrogate, or other competent judge in this behalf, to prohibit them and every of them, that neither they nor any of them do any further hold pleas in the said spiritual court, before them or any of them, touching the premises aforesaid, or any part thereof,” &c.

For other forms, respecting other matters, see the Books of Entries.

In what cases courts will grant prohibition in matters of tithes.

From various books and reports, the force, effect, and validity of agreements for *tithes*, whether such agreements are by indenture or *parol*, appears to be a very unsettled point. And it is said to be the constant practice of the courts at Westminster not to grant *prohibitions* upon the suggestions of such agreements, but to leave it to the spiritual court to determine: and if the party thinks himself there aggrieved, he may appeal. And this seems to hold still, as to such *parol* leases under the term of three years; for if they be above three years, then, by the *stat. of frauds and perjuries*, they are made to have the force only of leases at will; and if under three years, yet by that statute there must be yearly reserved two-thirds, at least, of the full improved value of the thing demised. Comp. Incumb. 339, 340. *Vide* Bac. Abr. 3 vol. 336, &c.

- (C) (C) Of proving the Suggestion, and entering such Proof according to 2 & 3 Edw. 6.

If the suggestion for a prohibition is to stop a suit commenced in the ecclesiastical court for subtraction of *tithes* or

other ecclesiastical dues, the 14th sect. of the 2 & 3 Edw. 6. c. 13. requires, "That if any party do sue for any prohibition in any of the king's courts; that then the same party, before any prohibition shall be granted to him or them, shall bring and deliver to the hands of some of the justices or judges of the same court where such party demandeth the prohibition, the very true copy of the libel depending in the ecclesiastical court, concerning the matter whereupon the party demandeth the prohibition, subscribed or marked with the hand of the same party; and under the copy of the said libel shall be written the suggestion, wherefore the party so demandeth the said prohibition: and in case the said suggestion, by two honest and sufficient witnesses at the least, be not proved true in the court where the prohibition shall be so granted, within six months next following after the said prohibition shall be so granted and awarded, that then the party that is letted or hindered of his or their suit in the ecclesiastical court by such prohibition, shall, upon his or their request and suit, without delay, have a consultation granted in the same case in the court where the said prohibition was granted; and shall also recover double costs and damages against the party that so pursued the said prohibition," &c.

Statute 2 & 3 Edw. 6. requiring suggestion to be proved in cases of subtraction of tithes, &c.

As this statute refers to the statutes 27 & 32 Hen. 8. which extends to tithes and offerings generally, all such tithes and church duties as are mentioned in those statutes are as much within this act as if enumerated. 2 Inst. 662. Comp. Incumb. 600. Dyer, 170. b.

Construction of statute.

And therefore it extends to prohibitions to suits for small tithes as well as great. Yelv. 102. Ld. Raym. 1172.

To what it extends.

So, a suggestion of a *modus decimandi* ought to be proved within six months, being within this act. Noy, 148. Yelv. 104.

So, where the party suggested, that he was to pay so much upon an *arbitrament*, being the same as a *modus decimandi*. Roll. Rep. 55.

But there needs no proof of the suggestion where the suit is for tithes contrary to common right, or where the contract of the party is suggested. Yelv. 104. 119. 2 Leon. 29. Hetl. 145. 2 Keb. 134. Lit. Rep. 297.

The suggestion need not be proved strictly; proof by hearsay is sufficient. Palm. 397. Or that it is so by common fame. Noy, 28. Nor with precise certainty as to all its circumstances; but that if it be proved in substance, or in such a manner as to shew that the ecclesiastical court hath not jurisdiction, it is sufficient.

How suggestion must be proved.

And

By what witnesses.

And the suggestion may be proved by persons, although such persons at the trial may not be able and competent witnesses. *Sharp v. Hobarts*, Mich. 27 Car. 2. C. B.

Within what time.

If a suggestion consists of two parts, one witness to one part, and another to the other part, it is sufficient. Vent. 107.

If the party is ordered to declare in *prohibition*, the proof of the suggestion need not be within *six months*, because the proof in such case is to be made at the trial of the cause. Cas. in C. B. 158.

The *six months* in this case is according to the *calendar*, and not *lunar months*, for this is a computation which concerns the church. Hob. 179. 2 Mod. 58. Lit. Rep. 19. And the *six months* commence from the *teste* of the writ of *prohibition*, not from the time of the rule for awarding it. 2 Ld. Raym. 1172. 2 Salk. 554. pl. 20. 656. pl. 2.

And if the surmise be proved before one of the judges within the six months, it is sufficient, although it is not recorded till after the six months by the court. Noy, 30. But it must be entered in the office. 2 Show. 308.

Proof may be amended.

And proof which is not sufficient, may be supplied with better within the six months. Lit. Rep. 155.

How the six months in stat. are computed.

The plaintiff had obtained a rule to shew cause why a *consultation* should not go, for want of the plaintiff's proving his suggestion within the *six months*, and why the plaintiff should not pay double costs. Upon cause shewn it appeared, that the declaration had been, by rule, ordered to be made agreeable to the proceedings in the spiritual court, and thereupon a prohibition to issue. And the court being of opinion, that the time for proving the suggestion ought to be computed from the time of the amendment, and not farther back, the six months were not expired. So the rule was discharged. Barnes, 428.

Of the costs on failure of proof of suggestion.

A writ of *prohibition* had been granted on motion, and plaintiffs not having proved their suggestion according to the stat. 2 & 3 Edw. 6. to be true within *six months*; it was moved, that a writ of *consultation* might be awarded for defendant, plaintiffs not proving their suggestion to be true within the limited time; and that plaintiffs might, according to the direction of the statute, pay defendant *double costs*. It was doubted, whether plaintiffs, being administrators, ought to pay costs. But the court seemed to think, that defendant was entitled of course to a writ of *consultation*. *Sed cur. advis'* as to both points. Barnes, 130.

Of entering the proof of the suggestion.

When the party has proved his suggestion before a judge, according to the 14th sect. of the 2 & 3 Edw. 6. c. 13. an entry of such proof must be drawn out in order to be entered

tered of record in court, which is to be done in the following manner, after the suggestion and the award of the writ of prohibition.

" And the writ of the prohibition of the lord the king is " granted to him," &c.

" Afterwards, that is to say, on the day of Form of entry.
" in the twentieth year of the reign of our
" sovereign lord George the Third, of Great Britain, France,
" and Ireland, king, defender of the faith, &c. at
" in the county of before [*the judge*] comes
" the said A. B. in his proper person, and to verify, testify,
" and prove his suggestion aforesaid, and all and every mat-
" ter and thing contained in the same suggestion on the part
" of the said A. B. to be proved, produceth three good,
" lawful, and sufficient witnesses, to wit, O. P. of
" in the county aforesaid, husbandman, and aged about
" twenty-four years or thereabouts; Q. R. of the same
" place, labourer, aged sixty years or thereabouts; and S. T.
" of the parish of in the said county, farmer, aged
" forty years and upwards, before the said justice at
" aforesaid, according to the form of the statute in such case
" made and provided: which said witnesses so as aforesaid
" produced by the said A. B. being then and there sworn
" upon the Holy Evangelists to depose the truth of and upon
" the premises specified in the aforesaid suggestion, say and
" depose, and each of them severally upon his oath faith and
" depose in manner and form following, that is to say, the
" said O. P. for himself, upon his oath faith and depose, that,
" that, &c. [*Here enter the proof of what he swears.*] And
" the said Q. R. for himself upon his said oath faith and
" depose, that, &c. [*Enter what he swears to.*] And the
" said O. P. and Q. R. for themselves severally upon their
" said oath say and depose, that, &c. [*Enter what they both*
" *swear to.*] And the said S. T. for himself, upon his said
" oath, faith and depose, that, &c. [*The part he swears*
" *to.*] Which said depositions taken before the said [*the*
" *name of the judge*], in form aforesaid, the said justice af-
" terwards, to wit, in Michaelmas term, in the nineteenth
" year of the reign of our said lord the now king, delivered
" by his own proper hands into the court of our said lord the
" king of the bench, here to be enrolled of record.

" Sworn the day of } By me ———"

" in the year of our Lord 1795, }

(D)

(D) Of verifying the Suggestion by Affidavit.

When affidavit
necessary where
matter of sug-
gestion does not
appear on libel;

In some cases the courts require an *affidavit* to be made on application for a *prohibition*, to support the *suggestion*. Per Holt, Ch. Just. B. R. in *Godfrey v. Llewellyn*, 11 W. 3. the Bishop of St. David's case. Where the matter suggested for a prohibition appears upon the face of the libel, we never insist upon an affidavit; but unless it appear upon the face of the libel, or if you move for a prohibition as to more than appears upon the face of the libel, to be out of their jurisdiction, you ought to have an affidavit of the truth of your suggestion. Salk. 549. pl. 3. *Eaton v. Burton*, Cow. 330.

or to verify the
truth of plea
having been
pleaded.

Upon motion for a prohibition, there must be an affidavit that the matter suggested to have been pleaded was pleaded below in the spiritual court, and disallowed; *vide* Ld. Raym. 1211; for otherwise, any one might come and suggest a false fact, and so oust the spiritual court of their jurisdiction.

Matter foreign
to the libel must
be pleaded be-
low, or verified
by affidavit.

In *Hynes v. Thompson* (mentioned by Aston Just. in *Buggin v. Bennet*, Burr. 4 pt. 2039, 2040.) Lord Ch. Just. Lee laid down the rule to be "That if you move for a prohibition upon any thing not appearing upon the face of the proceedings, you ought to have an affidavit of the truth of the suggestion." And he cited *Godfrey v. Llewellyn*, 2 Salk. 549, in point; and 2 Salk. 551, pl. 13. where Holt, Ch. Just. laid down the law to be, "That wherever the matter which you suggest for a prohibition is *foreign* to the libel, you must plead it below, before you can have a prohibition; otherwise, where the cause of prohibition appears upon the libel." And Lord Ch. Just. Lee said, in that case of *Hynes v. Thompson*, that he thought it must either be pleaded "that there was such a custom," or an *affidavit* of it. And Mr. Just. Chapple hinted, that prohibitions had been too easily granted; and was of opinion, that there ought to have been an affidavit to verify the suggestion.

Exception to
the rule.

In *Driver v. Colgate* (mentioned also by Aston Just. in the same case of *Buggin v. Bennet*, Burr. 4 pt. 2039, 2040.) the court held, that there was no necessity to plead it below, in cases of prohibition for words spoken where they are by the custom actionable, as there is in case of a prohibition or suggestion of a *modus*. For in the former case, they cannot go on if the suggestion be true; but in the latter of a *modus*, if the *modus* be admitted in the spiritual court, they may go on, because the jurisdiction continues.

In

In all other cases the court laid down a general rule, Which holds in all other cases.
 "That the matter must either be *pleaded* below, or verified
 "by *affidavit*." *Vide* Burr. Rep. 4 pt. 2040.

As in case for a prohibition to the consistory court of London, in a cause for calling a woman "*whore*" in London, there must be an affidavit of the *custom*, and also that the words were spoken there. *Theyer v. Eastwick*, Burr. 4 pt. 2032.

In C. B. on shewing cause why a prohibition should not be granted, it was objected, that no affidavit was filed, whereby the libel whereupon the plaintiff had moved, appeared to be a true copy. *Per cur.*—The objection is good. Rule discharged. *Eaglesfield v. Anderson*, Barnes, 427.

On a rule to shew cause why an *attachment* should not be granted against the mayor of Marlborough, for refusing to accept the defendant's plea in his court, it was held not to be sufficient for a defendant in a court below to bring his plea into court, and offer to make oath of the truth of it; but that he must tender his plea with an affidavit annexed of the truth thereof, and that this must be done before a general imparlance; but that he might have prayed a *special imparlance*, and then have come to the next court and pleaded. It was also held, that the proper way of proceeding was not by *attachment*, but that a *prohibition* should have been moved for; and so the rule for an attachment was discharged. *Vokens v. Gull*, B. R. Hil. 12 Geo. 2.

(E) Of granting the Prohibition.

(E)

Prohibitions are granted either absolutely, or *hoc usque* only till such an act be done. The first of these is peremptory, and ties up the inferior jurisdiction till a *consultation* is awarded; the second is *ipso facto* discharged upon complying with the act, and that without any *writ of consultation*. 6 Mod. 308.

When a prohibition is moved for because a copy of the libel is denied, the court requires that oath should be made of the denial, and the prohibition is only *quousque* the copy be delivered. Vent. 252. 2 Salk. 553. pl. 19.

The stat. 2 Hen. 5. stat. 1. c. 3. requires a copy of the libel in the ecclesiastical court to be given to the party sued there. But as this statute extends only to the *ecclesiastical courts*, a prohibition was denied to be granted to the *admiralty court*, upon a suggestion that they refused to give the party sued there a copy of the libel. *Ld. Raym.* 442.

A prohibition *quousque* they give a copy of the libel, if it be granted before any libel exhibited, does not bind them from

from exhibiting any libel; but after, they shall not proceed till they give a copy of it. 6 Mod. 308.

It was formerly held by all the judges, that when there was a proceeding *ex officio* in the ecclesiastical court, they were not bound to give the party a copy of the articles: but the law is otherwise; for in such cases, if they refuse to give a copy of the articles, a prohibition shall go *quousque* they deliver it. Ld. Raym. 991.

In C. B. a rule was made for civilians to be heard on both sides in relation to a prohibition. Dr. Lee attended to argue against the prohibition; but none would attend to argue for it, as by affidavit appeared. *Per cur.*—We ought to hear civilians on both sides, or not at all. Enlarge the rule; perhaps, when our opinion is known, a doctor may attend on the other side. Afterwards no civilian attending to argue for the prohibition, the court would not hear Dr. Lee against it. Barnes, 428.

Whether prohibition grantable last day of term.

A prohibition is not grantable the last day of term, but on motion, a rule may be obtained to stay proceedings till the ensuing term. Latch. 7. 2 Roll. Rep. 456.

But a prohibition to an ecclesiastical court was granted the last day of term on motion, leave having been obtained the day before, "to move it then." Burr. Rep. 4 pt. 1922.

(F)

(F) Of declaring in Prohibition, &c.

Court generally orders a rule nisi,

The court seldom awards a *prohibition* upon the motion, but generally grants a rule *nisi*, or that the adverse party should shew cause why it should not be granted. Cro. El. 16. 94. 5 Mod. 247. Ld. Raym. 86. 236. Willf. Rep. 7. pl. 2.

and in nice cases directs plaintiff to declare.

Also in nice and difficult cases it is usual to direct the plaintiff to declare in *prohibition*; Cro. El. 736. 4 Mod. 151. Lev. 125. Ld. Raym. 88.—and so proceed to issue, that the merits of the cause may be brought before them with the greater exactness, and the court thereby be the better enabled to judge of the reasonableness of granting or refusing the writ. Stil. Pract. Reg. 43. F. N. B. 44.

How far plaintiff's declaring is matter of right on part of defendant,

When the court inclines to grant the motion for a prohibition, the defendant has a sort of right to insist that the plaintiff shall declare; but where the court inclines against the motion, the plaintiff has no such right, for there might be judgment by default, and the court be obliged to prohibit against their own opinion; and it is no injury to the plaintiff, as he may apply to another court. *The King v. the Bishop of Ely*, Mich. 30 Geo. 2.

So it appears, that leave to declare in prohibition is only granted when the court inclines to prohibit; not when it inclines to the contrary. *Vide* 1 Blackf. Rep. 81.

The

The court is not obliged to give direction for such declaration, but are absolute judges of the sufficiency or insufficiency of the suggestion. Leon. 181.

Nor will the court put the party to declare in prohibition, if they are clearly of opinion against granting the prohibition, because the same application may be made to the other courts. *Lindo v. Rodney*, Doug. 620.

Where the party is ordered to declare in prohibition, he ought not to take out the writ, but serving the other side with a rule is sufficient; and if in that suit he obtain judgment, the judgment is *stet prohibitio*, otherwise it is *quod eat consultatio*; therefore if the party be excommunicated, the mandatory part of the writ to assail the party is not to be obeyed till after trial had. *The Dean and Bishop of Wells*, Mich. 25 Geo. 2.

In cases of tithes and such sort of matters where many things are in controversy, it is very frequent to order the prohibition to stand as to part, and a *consultation* to go as to the other part.

If the declaration in prohibition varies from the suggestion, this is naught, and a *consultation* shall be awarded. 7 Mod. 113. Leon. 128. For the summe is as the writ.

The declaration in prohibition is founded upon an *attachment* for a contempt, and therefore the declaration in prohibition is a *qui tam* declaration, for it supposes a contempt to the king in proceeding after the writ delivered. 12 Co. 61. But the contempt is but form, and the jury need not give any verdict about it. Stra. 482.

If the jury upon an issue joined in a prohibition *de modo decimandi*, find a different *modus* than that alleged by the plaintiff, yet the defendant shall not have a consultation; because it appears that he ought not to sue for tithes in *specie*, there being a *modus* found. Vent. 32.

The declaration ought to shew a place where the defendant proceeded, after the prohibition served; otherwise, the plaintiff shall not have judgment, though the writ of inquiry finds damages. 1 Vent. 348. 350. Ray, 387. 2 Jones, 128. 2 Show. 145.

Two persons cannot join in the declaration, where the cause of complaint is several. Cro. Car. 162.

If the libel be against several parishioners, who all insist upon the same *modus*, they cannot join, but must have several prohibitions. Yel. 128. R. Raym. 425.

If there appears cause for a prohibition, there shall not be a consultation, though the declaration be defective for want of form; as because there is not the *profert* of a deed, or letters-patent. *Per Coke*. 1 Rol. 332.

or in discretion of court.

When not directed.

How to proceed when plaintiff is ordered to declare;

and of the judgment thereon.

Of prohibition standing as to part and consultation going to part.

Of the declaration in prohibition.

What declaration should contain.

Of the parties thereto.

Of defects therein.

Of amending
declaration.

Of the issue,
damages and
costs.

Construction of
statute of 8 & 9
W. 3. as to
costs;

and from what
time to be
taxed.

How if plaintiff
has declared and
defendant does
not proceed.

After a rule given to declare in prohibition, the defendant may submit and stay proceedings. *Stra.* 1149.

The declaration in prohibition was ordered to be amended by a judge, but the amendment not being warranted by the suggestion, or the acts of the spiritual court, the order was discharged. *Barnes*, 7.

Where an issue is joined on a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they shall give no more than *one shilling* damages, for it is in nature of an issue to inform the conscience of the court. *Carter v. Leeds*, Mich. 2 Geo. 2. But after the plaintiff has had judgment *quod stet prohibitio*, he may bring his action upon the case, and recover the damages he has sustained.

On shewing cause against a *prohibition*, the court made the rule absolute, with a direction that the plaintiff should declare in prohibition. He tendered a declaration, but the defendant refused it, and applied to stay the proceedings, as being willing to submit. The other insisted he had a right to go on, and so get at the *costs* of the motion, which he could not otherwise have; but the court stayed the proceedings without costs; saying, the direction to declare was in favour of the defendant, who might waive it. *Gegge v. Jones*, *Stra.* 1149. [*Vide* the statute 8 & 9 W. 3. c. 11. f. 3. which gives costs in prohibition upon plaintiff's obtaining judgment, or any award of execution after *plea pleaded or demurrer joined.*] But the plaintiff can recover no costs in prohibition, unless he has execution after *plea or demurrer*, and judgment for him, but then after such judgment and execution; after *plea or demurrer*, the costs shall be taxed from the suggestion, so as to take in the motion. *Wills v. Turner*, Hil. 2 Geo. 1. C. B. 2 Crom. 273.

It was at the defendant's instance made part of the rule whereby a writ of prohibition was granted, that the plaintiff should declare in prohibition. Defendant afterwards demanded a declaration, and threatened a *non pros* for want thereof. Whereupon a declaration was prepared: and when it was ready, he was told by defendant's agent that he need not deliver it; but as he had been at the trouble and expence in preparing it, he delivered the same, and called for a plea. Defendant pleaded nothing to the merits, but only that he did not proceed in the spiritual court after the prohibition, gave a rule to reply, and demanded a replication. Whereupon plaintiff applied to the court, and obtained a rule for defendant to shew cause, why he should not pay the plaintiff's costs of the proceedings in prohibition. Which rule was made absolute. The court looked on the plea to be a *sham nugatory plea*, and not to the merits of the cause: the allegation,

allegation, that defendant has proceeded contrary to the prohibition, is and must be put into every declaration of this kind: but whether he has so proceeded, or not, is totally immaterial. The stat. 8 & 9 W. 3. c. 10. l. 3. gives costs after plea or demurrer: but this is not a plea within the statute. *Seed v. Wolfenden*, Bar. 148.

Since the 8 & 9 W. 3. c. 10. giving plaintiff in prohibition, obtaining judgment, or any award of execution after plea or demurrer, his costs, it has been held, that these costs commence from the *suggestion*, which is taken to be the commencement of the suit, in lieu of an original writ in prohibition; and if a feigned issue is directed, and found in plaintiff's favour, he shall have the costs of that too. *Palmer v. Williams*, Clerk. Barnes, 13c.

From what time costs commence.

The stat. 8 & 9 W. 3. extends only to cases after plea pleaded, or demurrer joined; but if there be judgment by default, and the plaintiff have damages on a writ of inquiry, for the contempt in proceeding after the prohibition delivered, (which is confessed by the default,) he will be entitled to costs at the common law. However, as this part of the declaration is no more than *form*, costs are allowed only from the time of a rule for prohibition. *Sir E. Bettison v. Dr. Hinchman*, Mich. 7 Geo. 1. C. B.

Cases within the statute.

After a verdict for defendant in prohibition as to part, the question was, whether he should be allowed costs pursuant to the statute Will. 3. or not? In *quare impedit*, if defendant has judgment, a writ is awarded to the bishop: in *replevin*, a writ of *return. habend.* and costs are given to the avowant, in some cases, by the stat. 21 Hen. 8. In *prohibition*, by 4 Jac. 1. a consultation is given, and since the stat. Will. 3. costs, &c. if verdict, &c. pass against the plaintiff. Rule that judgment be entered, for a consultation as to part, and for costs. The *postea* was agreed to be altered, with respect to finding that plaintiff proceeded in the spiritual court after the writ of prohibition delivered to him, which is material. *Maltam qui tam v. Acklam & al.* Barnes, 138.

Of costs after verdict.

(G) Of the Writ of Consultation.

(G)

A writ of *consultation* is so called, because, upon deliberation and consultation had, the judges find the *prohibition* ill founded; and therefore, by this writ, they return the cause to its original jurisdiction, to be there determined.

Its nature.

If a prohibition be granted without notice to the other party, and upon motion it appears that there was no cause for it, the court will grant a *consultation*, without putting him to declare upon the prohibition. Cro. Car. 97.

When consultation will be granted or not, and by whom, and of the consultation as to part.

So, after a prohibition granted, if upon trial the matter be found for the defendant, generally, a *consultation* shall go.

So, if the matter found for the defendant varies in words, but not in substance, from the suggestion; as if the suggestion be, that *two thirds of the tithes* belong to the plaintiff, and the verdict is *two entire parts of all tithes*.

So, if there be a material variance between the suggestion for a prohibition, and the libel in the spiritual court, there ought to be a *consultation*; for the prohibition ought to be founded upon the libel; as if the libel be for tithes of corn, and a *modus* be suggested for tithes of hay, upon demurrer to the declaration in prohibition, a *consultation* shall go. Yel. 79.

So, if there be a variance in quantity, as if the libel be for two hundred faggots of wood, and the suggestion be for twenty only. Yel. 79.

So, after a prohibition granted, if it appears that the spiritual court has consufance for part, a *consultation* shall go *quoad*, &c. 12 Co. 44.

So, if after a prohibition granted it be not served till sentence and appeal, it cannot be afterwards used. Cro. Jac. 429.

But a *consultation* shall not be granted except in term. 12 Co. 41.

Nor by a judge, but only in court. *Ibid*.

Nor after a declaration upon a prohibition, it shall not be granted upon motion before *plea* or *demurrer*. Cro. Car. 238.

Nor shall a *consultation* go, where a verdict is found for the defendant, if it appears upon the whole matter that the spiritual court has no consufance; as if a prohibition be upon a suggestion, that all lands in *A.* are discharged by a *modus*, and there is a verdict for the defendant, because it is found that all, except *ten acres*, are within the *modus*; yet a *consultation* does not go for such mistake in the issue, if the libel was not for tithes of the ten acres. 2 Rol. 320. l. 5. 15. Hob. 192.

So, if the suggestion was of unity, *ratione cujus* he shall be discharged, and a verdict finds that he shall not be discharged *ratione inde*; though it be against the plaintiff, yet being impertinent, for the fact to be tried was, whether there was an unity, &c. a *consultation* does not go. 2 Rol. 320. l. 35. 11 Co. 15.

So, though there be an immaterial variance between the suggestion and the libel, a *consultation* does not go: as if the suggestion be for a total discharge upon the stat. 31 Hen. 8. and recites the libel to be for twenty faggots, where it was for two hundred; for it was not material for what quantity the libel was, when the plaintiff claims a discharge for the whole. Yel. 75.

So, if the suggestion varies in quantity from the libel, if it be conformable to the copy of the libel delivered by the spiritual

spiritual court, this variance shall not be a ground for a consultation. 2 Rol. 329. l. 45.

So, though the *modus* be not proved, as laid by the plaintiff, although there must be a verdict for defendant, who is entitled to costs; yet, if any *modus* be found, though different from that laid, the court will refuse a consultation. *Brock v. Richardson*, 1 D. & E. 427.

A writ of consultation is to the following effect:

“GEORGE the Third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth. To the right worshipful J. C. master of arts, vicar general, and principal official of the episcopal or consistorial court of &c. Whereas C. D. lately in the court christian before you impleaded A. B. by the name and description of A. B. of the parish of in the county of Devon, for this, that by the laws, &c. (*here set forth the substance of the libel*) as by the libel of the said C. D. amongst other things more fully appears. And whereas the said A. B. has lately prosecuted and caused to be directed to you our certain prohibition out of our court, before our justices at Westminster, that you should no farther hold the plea aforesaid, in the court christian aforesaid, before you, or any thing farther in that behalf attempted, by pretence of which our said prohibition you have from thence hitherto delayed, and yet do delay further to proceed in the cause aforesaid, as we have understood, to the great damage of the said C. D. and to the manifest prejudice of the ecclesiastical liberty. Wherefore the said C. D. hath in our court, before our said justices at Westminster, humbly besought us to grant him our aid and assistance in this behalf; and we favourably consenting to the petition of him the said C. D. and being unwilling that the cognizance, which to the ecclesiastical court in this behalf belongs, should be further delayed by such false and subtle assertions; because in our said court, before our said justices at Westminster, it is in such manner proceeded, that it is considered by the same court, that the said C. D. may have our writ of consultation to the court christian aforesaid, our said writ of prohibition to the contrary thereof notwithstanding, whereof the said A. B. is convicted, as it appears to us on record. We therefore, being unwilling that the said C. D. should be in anywise injured in this behalf, signify to you, and command, that you may in that cause lawfully proceed, and further do what you shall know to belong to the ecclesiastical court, our said prohibition to the contrary thereof

Form of writ of consultation.

" thereof before to you directed in anywise notwithstanding.

" Witness Sir James Eyre, knight, at Westminster, the day of," &c.

Of the effect of the prohibition when granted ;

and in what cases it is not final.

When the court grants the writ of *prohibition*, such writ is not absolutely final and conclusive, even in ordinary cases. For though the ground be a proper one in point of law, for granting the *prohibition*, yet, if the *fact* that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction. If, for instance, a *custom* be pleaded in the spiritual court, a *prohibition* ought to go, because that court has no authority to try it; but if the fact of such a custom be brought to a competent trial, and be there found false, a writ of *consultation* will be granted. And for this purpose it is, that the party prohibited may appear to the *prohibition*, and take a declaration, (which must always pursue the suggestion,) and so plead to issue upon it; denying the contempt, and traversing the custom upon which the *prohibition* was grounded; and if that issue be found for the defendant, he shall then have a *writ of consultation*.

(H)

(H) Of granting a Prohibition after a Consultation awarded.

Statute 50 Edw. 3. Construction thereof.

By the 50 Edw. 3. c. 4. " It is ordained and stablished, " That where a consultation is once duly granted upon a " prohibition made to the *judge of the holy church*, that the " same judge may proceed in the cause by virtue of the " same consultation, notwithstanding any other prohibition to " him thereupon delivered: Provided always, that the matter " in the libel of the said cause be not engrossed, enlarged, or " otherwise changed."

Judge of holy church means spiritual judge; and therefore this statute extends not to the court of *admiralty*. 2 Brownl. 35.

Same judge means ecclesiastical judge in general, or person competent, and not to the same individual person. Pop. 159. Palm. 418. Latch. 6. 75.

This statute hath been construed to extend to those cases only, where a *consultation* hath been lawfully granted, that is, upon the right and merits of the thing in question, and not to such cases where, for defect of form, misprision of a clerk, misleading an act of parliament, &c. consultations have been awarded. 2 Brownl. 26. 247. Leon. 130. 3 Bullst. 182. Moor, 917.

No prohibition after consultation;

And therefore regularly, where a consultation was awarded upon the merits, the party shall not have another prohibition upon the same suggestion.

Though

Though he appeals, and then prays another prohibition. R. Pop. 159. Lat. 6. 1 Rol. 378. Moor, 919.

Though the consultation be granted by another court. Cro. El. 277.

And though he varies in the *modus* upon which the former prohibition was had. 1 Rol. 378.

But if a consultation was awarded for want of form in the suggestion, or proceeding thereon, another prohibition may be allowed. Cro. Car. 208.

So, if the consultation was awarded for want of proof of the suggestion within the *six months*, pursuant to the statute 2 & 3 Edw. 6. the plaintiff is not precluded, but may bring another prohibition (but then he must pay *double costs*, according to the statute, Carth. 463.); for this statute of Edw. 3. goes to the suggestion made upon the same libel, and to a consultation duly granted, and not to the case of not having witnesses ready to prove the suggestion through negligence. But it was said by Holloway, Just. that after a consultation awarded for not proving his suggestion, &c. the party shall be for ever barred from having another prohibition on the same libel. Comb. 63.

But if, after a consultation for want of proving his suggestion, the party appeals, there may be another prohibition to the court, to which the *appeal* was, upon the same suggestion. 2 Rol. 500.

So, if after a consultation the libel is enlarged or changed. 2 Rol. 207.

So, if a consultation goes for a *collateral* matter, as if the plaintiff was nonsuited. Com. Dig. 4 vol. 484. But. Keb. 286. If, upon the trial of a suggestion, the plaintiff be nonsuit, no new prohibition shall be granted, although the nonsuit was occasioned for want of some of the plaintiff's witnesses, who were to prove the truth of the suggestion, and who were necessarily obliged to be absent.

But where the suggestion was for a *modus* of tithe of lambs in the parish, and a consultation went, another prohibition shall go upon a suggestion of the same *modus* in a *particular farm*. 2 Vent. 47. This case is reversed there.

So, if a consultation goes, and there be afterwards a new libel for the same species of tithes in another year, a prohibition shall go upon the same suggestion as was tried before. Yel. 102.

And if a consultation goes, and the party against whom appeals; the appellee may have a prohibition, though the *appellant* cannot have it. Pop. 159.

So if, after a consultation, the plaintiff pleads the same matter (which was suggested and found against him at common

except it issued for want of form in suggestion; or for want of proof of suggestion;

or if libel be afterwards changed;

or appeal made;

or plaintiff pleads what has been tried at law;

common law) in the spiritual court, which is accepted, and proceeds there for a trial, the former defendant may have a new prohibition: for they cannot try, in the spiritual court, a matter determined at a trial at law, which was proper to be there tried, as if a discharge within 31 Hen. 8. was suggested. 2 Rol. 319. l. 45. Hob. 286.

or if it were
only a prohibi-
tion hoc usque.

If the ecclesiastical court refuse to grant a copy of the libel for which a prohibition is granted, and thereupon they grant the copy, and afterwards proceed in the cause, the matter not being *within* their jurisdiction, another prohibition lies. Moor, 917.

How if defend-
ant dies.

If the defendant in prohibition dies, his executors may proceed in the ecclesiastical court, and the judges of the court out of which the prohibition was granted will also in such case make a rule to the spiritual court to proceed: but then the plaintiff may, if he pleases, have a new prohibition against the executors. Lil. Rep. 155.

(I)

(I) Of Disobedience to the Writ of Prohibition.

Of the disobe-
dience to writ
of prohibition,
and how pun-
ished.

The disobeying a prohibition is a contempt to the superior court that awards it, and punishable by *attachment*, which issues against the judge and party for proceeding after such prohibition, and for which they are subject to fine and imprisonment, according to the direction of the superior court. F. N. B. 40. Bro. tit. Pro. pl. 5. 9. 11. and 279. Though the writ was not directed to the party. 19 Hen. 6. 54. And such attachment may be awarded against a peer of the realm. 21 Edw. 3. 3. pl. 7.

Of the attach-
ment.

An *attachment* was granted upon an affidavit that the party proceeded after a prohibition delivered to him, in a suit for a seat in the church, which the plaintiff claimed by *prescription*; and upon his appearance and examination upon interrogatories, he confessed the matter, and was fined five marks. *Dr. Wainwright's case*, 2 Jon. 47.

And not only an *attachment* lies for proceeding in the same cause pending a prohibition, but also for instituting a new suit for the same thing; as if a person libels for tithes, and a prohibition is brought, and he libels for tithes of another year, the first not being determined, an *attachment* shall be awarded. Leon. 111. Moor, 599.

And in an *attachment* upon a prohibition, the plaintiff shall recover damages and costs against the party for proceeding after the writ of prohibition awarded. Cro. Car. 559. 2 Jon. 128. Vent. 348. 3 Lev. 360.

Of the ancient
practice in such
cases;

Note; In the cases of *prohibitions*, where they were granted on motion, the ancient course was, that the party prohibited sued

sued out a *scire facias quare consultatio non debet concedi post prohibitionem*; in which writ the suggestion was recited, and also a prohibition granted thereon, *ad damnum* of the party; afterwards this practice was altered, and the course came to be thus: (*viz.*) Upon granting a prohibition to the plaintiff, the court bound him in a recognizance to prosecute *an attachment of contempt* against defendant, for suing in the spiritual court after a prohibition granted, and then to declare upon the prohibition. So that he who was the defendant in that court, is now become actor or plaintiff in the court above.

C H A P. XVII.

AS there are some detached heads of practice not immediately connected with any particular action, but in a great measure applicable to all, it was thought proper to arrange them in a distinct chapter.

SEC. 1. *Of discontinuing the Action.*

SEC. 2. *Of entering a Noli Prosequi.*

SEC. 3. *Of the Retraxit.*

SEC. 4. *Of Staying Proceedings on Payment of Debt and Costs.*

SEC. 5. *Of the Statutes of Limitation, and suing out Writ to save the Statute.*

SEC. 6. *Of discharging Debtors under the Lords' Act.*

SEC. 7. *Of Summons and Motions.*

SECTION I.

Of discontinuing the Action.

Discontinuance
when necessary.

If the plaintiff, after the commencement of a suit, wishes to proceed no farther therein, either from the action not being maintainable, or from the form of action being misconceived, or the wrong parties having been sued, or from any other cause, he may *discontinue* the suit, and afterwards begin again *de novo*, or not, as he thinks fit.

How if no proceedings, nor
discontinuance.

But should he neither proceed in due time, nor regularly *discontinue*, defendant may obtain judgment of *non pros* against him; or, should the plaintiff bring a second action for the same cause, without having discontinued the first, defendant may plead *auter action pendent*, and plaintiff will be saddled with the costs.

Terms of discontinuance.

Whenever plaintiff discontinues, it is upon payment of costs. Stat. 8 Eliz. c. 2. sec. 2.

As to executors, &c.

Executors and administrators pay costs of discontinuing where they have knowingly brought their action wrong; but

but not otherwise. Burr. 1451. 1584. 1928. Bar. 169. 1 Blac. 451.

An avowant in replevin, cannot discontinue; for though he is an actor in law, yet it is the plaintiff's suit. Stra. 112.

Plaintiff may discontinue, as a matter of course, any time before verdict or judgment on demurrer. 1 Sal. 178. Bar. 307.

And even after judgment on demurrer, plaintiff, upon motion in court, may sometimes get a rule to discontinue.

But this depends much upon the nature of the case, and of the demurrer; for, in general, where the question determined on the demurrer, goes to the merits of the action, the court will not give leave to discontinue. *Turner v. Turner*, 2 Lord Ray. 856. 1 Sal. 179. But there are cases both ways; see *Henderson v. Williamson*, Stra. 116. *Butler v. Massey*, Str. 76. and 3 Leo. 440.

After judgment on demurrer, (but not entered on record,) and writ of error brought, plaintiff had leave to discontinue on paying costs on writ of error. *Pym v. Warren*, Bar. 169.

The court will never grant leave for plaintiff to discontinue after a general verdict, which is final; but after a special one it has been done. 1 Sal. 178.

Nor after writ of inquiry executed and returned. Carth. 86.

Unless the defendant consents thereto; the reason is, because if the plaintiff will not enter up judgment, defendant may. 1 Sal. 178.

If the action be against defendant as a justice of the peace in the execution of his office, and plaintiff moves to discontinue, defendant may make an affidavit of the fact, upon which court will make it part of the rule that plaintiff shall pay double costs. Though in case of a verdict or nonsuit, it must be done by way of suggestion. Str. 974.

If discontinuance be by fide-bar rule, which is of course before verdict or argument on demurrer or execution of inquiry; get rule—

K B.

Of clerk of rules.—Carry it to the Master; get appointment thereon for taxing costs; serve copy thereof on defendant's attorney, at the time fixed; Master will proceed to tax costs whether defendant's attorney attend or not.

C. B.

Of secondary.—Get appointment from prothonotary to tax costs; serve copy thereof on defendant's attorney; if no attendance, repeat the service three times; costs will then be taxed.

The rule is only conditional, and does not stay proceedings till the costs are paid.

So

So that the mere service of the rule to discontinue does not of itself discontinue an action; there must be an appointment to tax the costs. *Whitmore v. Williams*, 6 D. & E. 765.

If discontinuance be by motion in court, it is a rule *nisi*; if made absolute, get rule of clerk of rules and proceed as above.

Though the plaintiff discontinue on the common rule, on payment of costs, he is not liable to an attachment for non-payment. *Stokes v. Woodeson*, 7 D. & E. 6.

Another kind of discontinuance.

There is another species of discontinuance which it may be proper to notice here, termed a discontinuance of *process*, the former being a discontinuance of the *action*.

Discontinuance of process, what.

This is somewhat similar to a *non pros*, for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and term to term, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend; but the plaintiff must begin again, by suing out a new original, usually paying costs to his antagonist. 3 Blac. Com. 296.

How continuances entered.

Before declaration there is, properly speaking, no continuance, though the parties by consent might have obtained a day called *dies datus prece partium*. After declaration, and before issue joined, the proceedings are continued by *imparlance*; after issue joined, and before verdict, by *vicecomes non misit breve*; and after verdict or demurrer, by *curia advisare vult*. Tidd, 419.

Necessity of entering them taken away.

But the necessity of entering these continuances is now nearly at an end, since the want of a continuance is aided by the appearance of the party. *Wynne v. Wynne*, 1 Wils. 40. Nor can the objection be made *pendente placito* before judgment, for it may be continued at the pleasure of the court. *Beechey v. Sir Thomas Shirley*, Cro. Jac. 211. And after judgment it is aided by the statutes of jeofails. 32 H. 8. c. 30. 4 & 5 Ann. c. 16. *Smith v. Bower*, Cro. Jac. 528.

No discontinuance by demise of the king.

Formerly all suits depending at the time of the demise of the king were thereby discontinued, but it is now otherwise by stat. 1 Edw. 6. c. 7.

SECTION II.

Of entering a Noli Prosequi.

The nature of a nol. prof.
Form of entry.

Another way by which a plaintiff may put an end to the proceedings is, by entering a *nol. prof.* as it is called; upon the record, which is as follows: "*Et prædictus A. B. per T. S. attornat. suum venit hic in curia, & fatetur se nolle*
"*ulterius*

"ulterius prosequi, ideo considerat. est quod defendens eat inde
"sine die."

When the *nol. prof.* goes to the whole cause of action, it operates in effect as a *retraxit*. And such judgment of *nol. prof.* could be pleaded in bar to a new action for the same cause. *Beecher v. Sir Thomas Shirley*, Cro. Jac. 211. But otherwise it may differ from a *retraxit*, and be only a relinquishment of part, not of the whole suit. 1 Will. 90.

For the plaintiff may enter a *nol. prof.* either as to the whole action, or only as to part of the action of the defendants.

Thus where plaintiff, after declaration, discovered defendant to be an infant, he entered a *nol. prof.*

But in such case the court look upon it as a discontinuance so far as to render the plaintiff liable to costs under 8 Eliz. c. 2. f. 2. *Cooper v. Tiffin*, 3 D. & E. 511.

Plaintiff, instead of entering a *nol. prof.* as to the whole, may only enter it as to part of the cause of action, or to one of the counts in declaration.

But if there are several counts in the declaration, and defendant demurs, shewing for cause that the counts are improperly joined, plaintiff cannot enter a *nol. prof.* as to some of the counts, and join in demurrer as to the other. *Rose and Mercy & Un. v. Bowler and others*, 1 H. Blac. 108.

Nor where there are two counts, and demurrer to one, because one of the defendants was not named in the last count, can plaintiff enter a *nol. prof.* on that count and proceed on the other. *Drummond v. Dorant*, 4 D. & E. 360.

But if there is issue upon part and demurrer on part, if demurrer be first argued, and judgment for plaintiff, he may enter a *nol. prof.* as to the issue, and proceed to writ of inquiry on demurrer. Sal. 221.

But if issue be tried first, the *venire* goes *tam* to try *quam* to assess contingent damages on demurrer.

The *nol. prof.* in the first case may be entered at the time of entering final judgment. *Fleming v. Langton*, Str. 532.

As plaintiff may enter a *nol. prof.* as to part of the cause of action, so he may as to some of the defendants where there are many.

Thus where two defendants in *assumpsit* sever in pleading, and one pleads a special plea, as bankruptcy, which on issue joined is found for him, plaintiff may enter a *nol. prof.* as to him, and proceed to final judgment and execution against the other. Doug. 169. n.

But this can only be done in *assumpsit* or actions on contract, where the plea of such defendant merely goes to his own *personal* discharge, not if it were a plea that went

Its operation.

May be entered as to the whole or part of action.

Plaintiff must pay costs.

How, if entered as to part.

In case of demurrer to some counts;

or issue and demurrer.

When such *nol. prof.* to be entered.

How, if against some defendants where there are many.

In *assumpsit*, where defendants sever.

to the merits of the action itself. *Noke and another v. Ingham*, 1 Wils. 89.

Nor unless he severs in pleading, because it is on a joint contract.

In torts and trespasss, must be entered before final judgment.

But in actions of trespass or tort, it is different; for torts are several, and plaintiff may at any time enter a *nol. prof.* as to one defendant and proceed against the rest, provided it be entered before final judgment. *Lover v. Salkeld*, Sal. 456.

SECTION III.

Of the Retraxisit.

Retraxisit, what.

But besides the above entry of a *noli prosequi* there is another way of a plaintiff getting rid of a suit, which is by making a *retraxisit*. This may be done when the trial is called on by a plaintiff coming in person into court where his action is brought, and saying he will not proceed in it. It is so called from the form of the entry. "*Et predicti, quarens in*

Form of entry.

"*propria persona sua venit & dicit quod ipse placitum suum*

How made.

"*pred. versus pred. defenden. ulterius prosequi non vult sed abinde omnino se retraxisit.*" A *retraxisit* must be always in person; if it is by attorney, it is error. 8 Rep. 58. 3 Salk. 245.

Wherein it differs from nonsuit;

A *retraxisit* differs from a nonsuit, in that the one is negative and the other positive; the nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxisit* is an open and voluntary renunciation of his suit in court, and by this he ever loses his action. 3 Blac. Com. 296.

or a *nol. prof.*

A *retraxisit* also differs from a *nol. prof.*; but in its operation is mostly similar to a *nol. prof.* entered to the whole cause of action, as has been shewn above. Cro. Jac. 211.

SECTION IV.

Of staying Proceedings on Payment of Debt and Costs.

When defendant may stay proceedings by paying debt and costs.

The above three sections of this chapter have shewn in what manner the plaintiff may put an end to the suit, by discontinuing, entering a *noli prosequi* or a *retraxisit*; but in many actions the defendant, if he is convinced of the justice of the plaintiff's claim, and wishes to prevent the expence of further proceeding, may also stop the proceedings, by paying the

the debt and costs. I say in many actions, because it cannot be done in all, but in those only which are brought for any specific debt or sum of money due, and when the amount of the demand is fixed or agreed upon by the parties; for whenever the *quantum* of the demand is disputed, the judge and court will not enter into the merits, but the parties must settle it before a jury. So in all actions for damages only, for any breach of agreement or *tort*, or trespass or the like, the amount of which a jury only can ascertain.

But there are some exceptions even in those cases, and under certain circumstances the court will stay the proceedings in an action of trespass for seizing goods, on defendant's restoring the goods or paying the full value of them, with costs of the action. *Pickering v. Truste*, 7 D. & E. 53.

But if it is a specific debt, defendant may take out a summons before a judge, for plaintiff to shew cause why, upon payment of the debt and costs of the action, all proceedings should not be stayed.

This leads me to notice the use and propriety, in many cases, of the modern practice of obtaining a judge's order, now granted of course for plaintiff to give in the particulars of his demand; for in obedience to this order, the plaintiff must specify the *items* for which he brings his action, mentioning dates and sums, by which means defendant is enabled to know the justice of the demand, and either to stay the proceedings by paying the whole, if the whole is due, or by paying so much as he thinks due, into court; nor can the plaintiff upon the trial go out of the particulars, by giving evidence of any *items* not mentioned therein.

Use of getting particulars of plaintiff's demand; and in what degree of strictness they must be adhered to;

In ejectment on a forfeiture, the court granted a rule that lessor of plaintiff should give in a particular of the covenants, of the breaches, of the times when, &c. on which he meant to insist that the defendant had forfeited the lease, and that he should not be permitted to give evidence at the trial of any thing not contained in those particulars. *Doe v. Phillips*, 6 D. & E. 597.

In an action brought by the assignees of *Hunter v. Selby*, for work and labour done by the bankrupt for *Selby*; plea, that promises (if any) were made by defendant and one *Townes*, and not by defendant only; replication, that they were made by *Selby* only, and issued thereon.

A bill of particulars was demanded by defendant under a judge's order, which was delivered by the defendant, consisting of a variety of articles, forming a long account of the whole transactions between the bankrupt and defendant and his partner. At the trial of the cause *Erskine* stated, that though the whole demand was for a large sum, as stated, he

should only go for those articles which he should be able to prove were specifically ordered by the defendant himself.—Gibbs objected, that the bill of particulars was appropriated to the demand as against the defendant and his partner, and that therefore the plaintiff must be bound by his bill of particulars, and that selecting out particular articles as appropriate to the defendant on his separate account, would be going out of the particulars. And of this opinion was Lord Kenyon, and the plaintiff was nonsuited. A motion was afterwards made for a new trial, which was refused. The bill of particulars was delivered before plea pleaded. London, Sittings after Hil. 35 G. 3.

or defendant's
set off.

In the same way, if defendant pleads a set-off, plaintiff may obtain an order for him to give in the particulars of his set-off, and thus be prepared with evidence to contradict it.

But as this is but a modern practice, and an indulgence to the party demanding the particulars, the court will not hold a very tight hand over the party giving it, unless they have reason to think that false particulars were given in purposely to mislead.

Not to be too
rigidly adhered
to.

Thus, where the particulars of plaintiff's demand, as given in under a judge's order, were for cash received of Hammersley and Co. 37*l.*, it appeared in evidence that 25*l.* was cash paid by Hammersley and Co. to defendant, but the remainder was the amount of a bill which had become due, but was not paid, which bill belonged to plaintiff, which Hammersley and Co. gave to defendant, defendant afterwards brought an action against an indorser of the bill, and recovered; it was objected that no evidence of this bill and of the action could be given under the above particulars; but C. J. Eyre held, that if plaintiff could shew defendant turned this identical bill into cash, evidence thereof might be given under the particulars, as cash received from the bankers, and that he would not be too rigid in this respect. *Vaughan v. Thatcher*, Mich. Sitt. C. B. Guildhall, 1795.

It is to be observed, that the staying proceedings by paying the debt and costs, is wholly distinct from the paying money into court; the latter is a matter of right, which, in certain cases, defendant may do without consulting the plaintiff, and the plaintiff is afterwards at liberty to proceed for a further sum, but the former is putting a complete end to the suit, by the full demand being satisfied, and the costs of the action paid, and can only be done by a rule of court or an order of a judge, served upon the plaintiff for that purpose, who may shew cause against it if he thinks fit.

SECTION V.

Of the Statute of Limitations, and suing out the Writ to save the Statute.

As well from the motive of "quieting men's estates and avoiding of suits," as also upon the principle that *vigilantibus non dormientibus jura subveniunt*, have the different statutes of limitation been passed. If therefore a plaintiff, through negligence or indolence, hath delayed prosecuting his claim, however just in its nature, beyond the time limited by the statute, such fact may be pleaded, and will be an effectual bar to the action.

Reason of the statutes of limitation.

The statutes, however, have provided (as hereafter mentioned) against certain circumstances, which, without any laches or default of plaintiff, might prevent him from commencing his suit in due time.

Of the Times limited by the Statutes for bringing in Actions.

Actions must be respectively brought within the following times, to be reckoned from the period when plaintiff is by law entitled to bring such action:

Of the times limited for the different actions

<i>Actions.</i>	<i>Statutes.</i>	<i>Years.</i>
Writ of right. - -	32 Hen. 8. c. 12.	60
Formedon and ejectment.	21 Jac. 1. c. 16.	20
Actions upon the case (except slander).	<i>Ibid.</i>	6
Actions upon account (except accounts between merchant and merchant).		
Actions upon trespass (except assault and im- prisonment). - -		
Actions upon debt, if not upon a specialty. - -		
Actions upon detinue. - - - replevin.	<i>Ibid.</i>	4
Actions upon trespass for assault, battery, and false imprisonment.		
Actions upon slander for words. - -		
All <i>qui tam</i> actions (except the statute of tillage).	31 Eliz. c. 5. s. 5.	1
	<i>Z</i> 3	In

In all cases if judgment be obtained by plaintiff, and it is afterwards *reversed on error* or *arrested* upon motion; or if defendant be *outlawed*, and outlawry afterwards reversed, plaintiff or his representative must commence a new action within a year from that time.

Of the Provision in the Statutes.

Exceptions in
the statutes
21 Jac. 1.
4 & 5 Ann.

Provided, that if the person entitled to such action be, at the time the cause of action arises or accrues, *within the age of twenty-one, feme covert, non compos mentis, imprisoned, or beyond the seas*; or provided the person *against* whom the action is to be brought be at that time beyond the seas; in such cases plaintiff may bring his action at any time within the above limited periods after such impediment is removed.

To enter into a detail of the cases adjudged upon the statutes would far exceed the limits of this work. For the general reading thereon the student is referred to the various abridgments and books upon the subject; a few of the latest decisions only being here subjoined.

Of the Exception as to Plaintiffs being abroad.

Construction of
the statutes.
How if one
plaintiff be in
England and the
others abroad;

Where there is a joint cause of action, if one of the plaintiffs be abroad and the others in England, the action must be brought within six years after the cause of action arises; for, as where several persons are debtors, the acknowledgment by one is sufficient to take the case of all out of the statute of limitations; so when they are creditors, the ability of one to sue for all takes such case out of the proviso of the statute. *Perry and others v. Jackson and others*, 4 D. & E. 516.

or if plaintiff be
a foreigner re-
siding abroad.

The exception in the statute is general; so that a foreigner always residing beyond the sea may reply that fact to a plea of the statute. *Strithorst v. Grame*, 2 Blac. 723.

As to the Time whence the Statute attaches.

At what time
the statute be-
gins to run.

On a mere loan of money, the time of limitation commences from the date of the loan; but where the money is lent on a special contract for repayment, it is the time of the repayment that fixes the period of the limitation.

So that on a bill of exchange, the statute begins to operate only from the time when the bill became due. *Witterston v. the Countess of Carlisle*, 1 H. Blac. 631.

Of the acknow-
ledgment of
debt taking case
out of statute.

But although six years have elapsed since the cause of action accrued, yet if within the six years the defendant has made any acknowledgment of the debt being due, or any promise to pay, this takes it out of the statute.

One of two makers of a joint and several promissory note having become a bankrupt, the payee receives a dividend under the commission, on account of the note, within six years before the action brought; this is such an acknowledgment of the debt as will prevent the other maker from availing himself of the statute in an action brought against him for the remainder of the money. *Jackson v. Fairbank*, 2 H. Blac. 340.

Receiving dividend under commission on acknowledgment;

So, if there be a mutual account of any sort between the parties, for any item of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account, and of a promise to pay the balance, so as to take the case out of the statute. *Catling and another, executor, v. Skoulding and another*, 6 D. & E. 189.

or any item being within six years on a mutual account.

Of this acknowledgment the jury are to judge.

So that a letter written by a defendant to the plaintiff's attorney on being served with a writ, neither expressly admitting nor denying the debt, should be left to the jury to consider whether it amounts to an acknowledgment of the debt so as to take it out of the statute. *Lloyd v. Maund*, 2 D. & E. 1760.

Acknowledgment is matter of evidence for a jury.

There may also be cases which fraud will take out of the statute of limitations. *Bree v. Holbeach*, Doug. 654.

Fraud will take case out of statute.

Of suing out Process to save the Statute.

As the statute of limitations when it attaches is an absolute bar to plaintiff's action, provided the defendant chooses to avail himself of it; it is often expedient for the plaintiff (although he may not at the time wish to proceed hostilely with the suit) to make a commencement of it, by actually suing out process, and getting it returned and entered upon the roll within the period (according to the nature of the action) limited by the statute. This is said to save the statute; because if at any time afterwards plaintiff is under the necessity of prosecuting the suit, he may sue out an *alias* writ founded upon the first writ or process, and proceed in his action; and should the defendant (not aware of this step having been previously taken) endeavour to take advantage of the statute of limitations by pleading it, plaintiff may reply such first writ so sued out within the six years, and continued with the proper continuances on the roll; which continuances may at any time be entered thereon, and thus prevent the operation of the statute.

Reason and use of suing out process to save the statute.

In order to save the statute, it is necessary that the writ should be *bonâ fide* sued out in time, for it will not do by relation,

How and at what time writ should be sued out.

lation, (as if the time expired in the vacation, and afterwards in the same vacation the writ is sued out *tested* the last day of the preceding term,) for the defendant may in his rejoinder set out the true time on which it issued. 1 Blac. 215. Otherwise, perhaps, it might avail. Ld. Ray. 432. 386. 889. 553.

How it should be continued.

It must also be regularly continued; that is, the same writ must be continued, so that it may appear that *the plaintiff is proceeding to bring the defendant into court on the suit originally commenced.*

Same process must be continued.

If therefore a bill of Middlesex be sued out, and continued down to a certain time, and then the plaintiff sued out an attachment of privilege; that will not be a continuance of the former writ, as it has no connection with it, and therefore will not save the statute. *Smith v. Bower*, 3 D. & E. 662.

What process is good for this purpose.

But an attachment of privilege, if sued out in the first instance, is a sufficient commencement of an action to avoid the statute, and may be afterwards properly continued. *Leadbeater v. Markland*, 2 Blac. 1131.

So is a *latitat*, without a bill of Middlesex previously issuing, or a *capias* without an original. Str. 736. 2 Blac. 925. *Leader v. Moxons*.

Or it may be by bill of Middlesex, or original.

So a bill may be filed in vacation against an attorney to save the statute. Doug. 313.

Or an original against a member of parliament may be sued out to save the statute. Lev. 111. Sal. 512. Lord Ray. 1113.

This process and continuances must be specially replied.

Whenever a writ is sued out to save the statute, and defendant pleads the statute, plaintiff must reply the special matter; it cannot be given in evidence.

So that the plaintiff to such plea, instead of tendering issue, must reply a *latitat*, (or the like,) sued out at such a time, and that the same was returned, and then shew the proper continuances down to the time of suing out the process upon which the defendant actually was brought into court; averring, that the first process sued out and returned was sued out with a view to exhibit his bill, (or the like,) or declare for the same identical cause of action, and that the same was sued out within the time limited by the statute. Salk. 420.

Informal process continued.

If the process at first sued out be somewhat informal, as when an attachment of privilege was made returnable on a general return, court will overlook it for plaintiff to save the statute, provided it be afterwards properly continued. 2 Blac. 1131. 3 D. & E. 662. *Smith v. Bower*.

But

But it is not sufficient to shew that a writ was sued out in time in order to save the statute of limitations, the plaintiff must also shew that it was returned. *Harris q. t. v. Woolford*, 6 D. & E. 617.

How to sue out Process, and make Entry on Roll.

The process sued out with a view to avoid the statute of limitations must be carried to the sheriff's office, in order to be returned with a *non est inventus*; after which it must be entered on a roll, as of the term in which the writ is returnable, thus:

As yet of the Term of the Holy Trinity, witness Lloyd Lord Kenyon.

Middlesex, to wit. The sheriff is commanded to take C. D. and E. F., if they may be found in his bailiwick, and keep them safely, so that he may have their bodies before our lord the king, at Westminster, on Wednesday next after three weeks from the day of the Holy Trinity, to answer A. B. in a plea of trespass, and to have then there this precept, by bill, Mansfield and Way. At which day, before our lord the king, at Westminster, came as well the aforesaid A. B. in his proper person, and offered himself against the said C. D. and E. F. in the plea aforesaid; and the sheriffs, namely and esquires, sheriffs of the county of Middlesex aforesaid, returned, that the aforesaid C. D. and E. F. are not, nor is either of them, found in his bailiwick.

Roll.

This entry of a bill of Middlesex will serve to illustrate the practice upon other process; for, if the process sued forth be a *latitat* or *attachment of privilege* in B. R., it must be set forth upon the roll, with the return in the same form; and such process, when returned, must be taken to the signer of the writs in B. R. to file the same; and the roll carried to the clerk of the judgments, to be entered and docketed; the plaintiff's attorney making out a docket-paper in this manner:

The entry of Thomas Smith, gentleman, one, &c.

Middlesex, to wit. Entry of a bill to save the statute between A. B. plaintiff, and C. D. and E. F. defendants.

Returnable, &c.

Roll.

If in B. R. the process sued forth is an original or *capias*, the entry thereof, with the return, must be made out accordingly and docketed; such process, when returned, being filed with the *flazer*.

So, in C. B. if it be an original or *capias*, the same must be filed with the *flazer*, and the roll carried in and docketed with the clerk of the judgments.

The

The continuances in such case, where the plaintiff is driven to shew the writ continued, may be entered upon the roll at any time. See *Harris v. Woolford*, 6 D. & E. 617.

SECTION VI.

Of the Discharge of Debtors under the Lords' Act.

Debtors in execution not exceeding 300*l*.

may petition;

when;

what petition must contain.

For the ease and relief of prisoners who shall be charged in execution for any sum or sums of money, not exceeding in the whole the sum of three hundred pounds (a), and who shall be willing to satisfy their respective creditors so far as they are able; it is enacted, "That if any person or persons shall be charged in execution (b) for any sum or sums of money, not exceeding in the whole the above sum, or on which execution or executions there shall at any time remain due, as shall be made appear by oath, a sum or sums of money, not amounting to above the said sum, and shall be minded to deliver up to his, her, or their creditor or creditors, who shall so charge him, her, or them in execution, all his, her, or their estate and effects, for or towards the satisfaction of the debt or debts wherewith he, she, or they shall stand so charged; it shall and may be lawful to and for any such prisoner, *before the end of the first term* (c) *which shall be next after any such prisoner shall be charged in execution*, by his creditor or creditors, to exhibit a petition (d) to any court of law from whence the process issued, upon which any such prisoner was or were taken and charged in execution as aforesaid, or to the court into which any such prisoner shall be removed by *habeas corpus*, or shall be charged in custody, and shall remain in the prison thereof, certifying the cause or causes of his, her, or their imprisonment; and not only setting forth, in every such petition, a just and true account of all the real

(a) By the 32 Geo. 2. c. 28. the sum was 100*l*.; by 26 Geo. 3. c. 44. it was increased to 200*l*.; by the 33 Geo. 3. c. 5. it is extended to 300*l*.

(b) The acts do not extend to persons in execution on *qui tam* actions. Burr. 1322. Blac. 372. Hart *q. t. v.* Hawkins.

Charged in execution means, when a person is actually delivered over to the marshal, and is detained within the walls of the prison; so that if a defendant is arrested on a *ca. sa.* and escape, and be afterwards retaken and committed to prison in the next term, he may apply in the following term to be discharged under the lords' act. 4 D. & E. 367. *Vaughan v. Durnell*.

(c) The prisoner must come and apply to the court, by petition before the end of the next term after his being charged in execution, otherwise the court has no jurisdiction vested or attached in it. *Williams v. Koughedge*, Burr. 747.

(d) See form thereof at end of this Section. It may be had printed of clerk of rules.

" or personal estate which he, she, or they so petitioning, or
 " any person or persons in trust for him, her, or them, is,
 " was, or were entitled to at the time of his, her, or their
 " so petitioning, and of all incumbrances and charges (if any
 " there be) affecting any such real or personal estate of the
 " person or persons so petitioning; but also, a just and true
 " account of all the real and personal estate which any such
 " prisoner or prisoners, or any person or persons in trust
 " for him, her, or them, or for his, her, or their use, was
 " or were interested in or entitled to at the time of his, her,
 " or their first imprisonment in the action in which such
 " person is charged in execution, either in possession, rever-
 " sion, remainder, or expectancy, to the best of the belief of
 " every such prisoner or prisoners, and so far as his, her, or
 " their respective knowledge extends concerning the same;
 " and likewise, a just and true account of all securities
 " wherein any part of the estates of any such prisoner or
 " prisoners consists; and of all the deeds, evidences, writ-
 " ings, books, bonds, notes, and papers concerning the
 " same, or relating thereto; and the names and places of
 " abode of the witnesses to all securities, bonds, or notes;
 " and where they are to be respectively met with, so far as
 " his, her, or their knowledge extends concerning the
 " same.

" And before any such petition from any such prisoner
 " or prisoners shall be received by any such court, every
 " such prisoner or prisoners shall give or leave, or cause to
 " be given or left, unto and for all and every the creditor
 " or creditors at whose suit any such prisoner or prisoners
 " shall stand charged in execution as aforesaid, or his, her,
 " or their executors or administrators, and at his, her, or
 " their usual place of abode, or to or for his, her, or their
 " attorney or agent last employed in any such action, suit,
 " cause, or causes, in case any such creditor or creditors,
 " his, her, or their executors or administrators, cannot be
 " met with, but not otherwise, *fourteen days (a) at least*, be-
 " fore any such petition shall be presented and received, a
 " notice in writing (b) signed with the proper name or mark
 " of every such prisoner or prisoners; importing therein,
 " that such prisoner or prisoners as aforesaid doth or do in-

Of the notice
 requisite to be
 given to the
 creditors;

(a) It should be complete fourteen days, i. e. excluding only one of the days. Burr. 2525. Morley v. Vaughan. But where the petition was lodged in time, though full notice was not given, prisoner was allowed to give a new notice. Burr. 747.

(b) The notice, petition, schedule, and affidavit are now printed, and may be had at the clerk of the rules; but for the forms thereof see the end of this Section.

" tend

what the notice
must contain.

Affidavit of
service thereof.

If court sat-
isfied, prisoner
ordered to be
brought up ;
duw.

Of creditors ap-
pearing, or not,
in consequence
of rule and
notice.

How court will
proceed.

" tend to petition the court from whence the process issued
" upon which he, she, or they stand charged in execution,
" or into the prison to which any such prisoner shall have
" been removed by *habeas corpus*, or shall stand charged in
" execution on any judgment recovered on any bill or de-
" claration filed or delivered in any such court; and also
" setting forth in every such notice or writing a true copy
" of the account or schedule, including the whole real and
" personal estate of the person or persons so designing to
" petition, which he, she, or they doth or do intend to de-
" liver into any such court, other than and except the ne-
" cessary wearing-apparel and bedding of the prisoner or
" prisoners, and his, her, or their family, and the tools or
" instruments of his, her, or their trade or calling, not ex-
" ceeding ten pounds in value of the whole.

" And an affidavit of the due service of every such notice
" shall be delivered with every such petition at the time of
" presenting thereof, and openly read in the court to which
" any such petition shall be addressed.

" And if such court shall thereupon be satisfied of the
" regularity of every such notice, such petition shall be re-
" ceived; and such court shall thereupon, *by order or rule of*
" *the same court* (a), cause the prisoner or prisoners so peti-
" tioning to be brought up to such court, on some certain
" day in such order or rule to be specified; and the creditor
" or several creditors at whose suit any such prisoner or pri-
" soners shall stand charged in execution as aforesaid, his,
" her, or their executors or administrators, to be summoned
" to appear personally, or by his, her, or their attorney in
" such court, at some certain day to be specified in such rule
" or order for that purpose.

" And if any creditor or creditors of any such prisoner or
" prisoners who shall be so summoned, his or her executors
" or administrators, shall appear in person, or by his, her, or
" their attorney; or if any such creditor or creditors, his or
" her executors or administrators, shall refuse or neglect to
" appear in person, or by his, her, or their attorney, then
" upon affidavit of the due service of such rule or order on
" him, her, or them, or his, her, or their attorney, if any
" such creditor or creditors, his, her, or their executors or
" administrators, cannot be met with, such court shall, in a
" summary way, examine into the matter of every such pe-
" tition, and hear what can or shall be alleged on either side

(a) The rule is drawn up by clerk of rules; a copy of which should be served on each creditor and on the gaoler, and an affidavit made of such service.

" for or against the discharge of any such prisoner or prisoners who shall so petition; and upon such examination, every such court is hereby required to administer or tender to the prisoner or prisoners respectively who shall so petition, and give such previous notice thereof as hereinbefore is directed, an oath, as drawn up in 32 Geo. 2. c. 28.

" And the court may thereupon order an assignment to be made on the back of the petition of the prisoner's estate and effects, and conveyed to the creditors, &c. (the same to be subject to prior incumbrances); the creditor may thereupon take possession, and sue in like manner as assignees of commission of bankrupts; and no release of the prisoner subsequent to such assignment may be pleaded in bar of any such action; and the court then will make a rule for discharge of the prisoner; and the sheriff or gaoler being served with a copy thereof will set the prisoner at liberty; nor is the sheriff liable to any action for an escape, if the assignee proceeds to make sale of the estate and effects of the prisoner, and to make a dividend accordingly amongst the other creditors.

Of the assignment of debtor's effects, &c.

How to proceed thereon.

" But in case the person or persons at whose suit any such prisoner or prisoners stood charged in execution as aforesaid shall not be satisfied with the truth of any such prisoner's oath, and shall either personally, or by his, her, or their attorney, (if he, she, or they cannot personally attend (a), and proof shall be made thereof to the satisfaction of any such court as aforesaid,) desire further time to inform him, her, or themselves of the matters contained therein, any such court may remand any such prisoner or prisoners, and direct him, her, or them, and the person or persons dissatisfied as aforesaid with such oath, to appear either in person or by his, her, or their attorney, on some other day to be appointed by such said court, some time at furthest within the first week of the term next following the time of such examination, but sooner (b) if any such court shall so think fit.

How if creditor appears and is not satisfied with prisoner's oath.

Of remanding prisoner.

" And all objections which shall be made as to the insufficiency in point of form against any prisoner's schedule of his estates and effects, shall be only made the first time (c) any such prisoner shall be brought up.

Objecting to schedule.

" And

(a) This may be by affidavit, stating the reasons of absence, as illness or the like, or by any person appearing and swearing to some sufficient cause of the parties absence.

(b) Court may order him to be brought up again in the same term, for it is discretionary, though by the former acts it was otherwise. *Bates v. Gamble*, Burr. 1393.

(c) It is a matter of course for court to remand prisoner the first time, if creditor wishes to inquire into the truth of the schedule. But the second time prisoner

How, if creditor
dissatisfied
when prisoner
brought up
second time.

" And if at such second day which shall be appointed,
" the creditor or creditors dissatisfied with such oath shall
" make default in appearing, either in person or by his, her,
" or their attorney, or in case he, she, or they shall appear,
" if he, she, or they shall be unable to discover any estate or
" effects of the prisoner omitted in the account set forth in
" such his or her petition (a), then and in any such case,
" such court shall, by rule or order thereof, immediately
" cause the said prisoner or prisoners to be discharged, upon
" such prisoner or prisoners executing such assignment and
" conveyance of his or her estates and effects in manner as
" assignments and conveyances of prisoners' estates and
" effects are hereinbefore directed to be made.

Of detaining
him by giving a
note for pay-
ment of groats.

" Unless such creditor or creditors who shall have charged
" any such prisoner or prisoners in execution as aforesaid,
" his, her, or their executors or administrators, doth or do
" insist upon such prisoner or prisoners being detained in
" prison, and shall agree by writing signed with his, her, or
" their (b) name or names, mark or marks, or under the
" hand of his, her, or their attorney, in case any such cre-
" ditor or creditors, his, her, or their executors or admi-
" nistrators, shall be out of England, to pay and allow
" weekly a sum not exceeding two shillings and four-pence,
" as any such court shall think fit, unto the said prisoner, to
" be paid every Monday (c) in every week so long as any
" such prisoner shall continue in prison in execution at the
" suit of any such creditor or creditors; and in every such

prisoner is brought up, plaintiff must be prepared to falsify the account given by defendant of his effects, if he can, or he will be too late to object to the schedule in point of form. *Jenner v. Swann*, Bar. 372.

(a) After a second bringing up, no further time allowed for inquiry. *Luke v. Wallis*, Bar. 370.

(b) A note for groats must be signed by all the creditors in the suit; if it be not, the defendant is entitled to his discharge, though he has received some payments under it. 7 D. & E. 156.

(c) The note must be made payable every Monday; any other day in the week will not do. *Lench v. Pargiter*, Do. 68.

Plaintiff's attorney appearing and offering to sign the note is not sufficient, if the plaintiff himself is in England; but if plaintiff cannot attend, he may sign it, and his attorney may make affidavit of his having signed it in his presence, and his witnessing the same; and if delivered at the time of his being brought up for his discharge, it will do. But it must be delivered in court. *Imp. K. B.* 646.

The form of the note is as follows:—

A. B. } I hereby promise to pay and allow to C. D. 2 s. 4 d. per week weekly,
" on Monday in every week, for so long time as he shall continue in
C. D. } prison in execution at my suit, as witness my hand this 20th day
of June 1798.

Witness E. F.

It is now settled by all the judges, that these notes need not be stamped. So determined on a conference held since the case of *Pitman v. Haynes*, 7 D. & E. 530.

" case,

"case, every such prisoner and prisoners shall be remanded back to the prison or gaol from whence he, she, or they was or were so brought up, there to continue in execution.

"But if any failure (a) shall at any time be made in the payment of the weekly sum which shall be ordered by any such court to be paid to any such prisoner (b), such prisoner, upon application in term time to the court where the suit in which any such prisoner shall be charged in execution was commenced or shall have been carried on, or in the prison of which court any such prisoner shall stand committed on any *habeas corpus*, or in vacation time, to any judge of any such court, may, by the order of any such court or judge, be discharged out of custody on every such execution, proof being made before such court or judge, on oath, of the non-payment for any week of the sum of money ordered and agreed to be weekly paid; but every such prisoner and prisoners, before he, she, or they shall be so discharged out of custody by any such rule or order, shall execute an assignment and conveyance of his, her, and their estates and effects in manner hereinbefore directed.

Of prisoner's discharge on failure of payment.

"And if any prisoner, who shall petition or apply for his or her discharge under this act, shall refuse to take the said oath hereinbefore directed to be taken, or taking the same shall afterwards be detected before any such court or judge of falsity therein, or shall refuse to execute such assignment and conveyance of his, her, or their estates and effects as aforesaid, as hereinbefore is required to be made by him, her, or them respectively, he, she, or they shall be presently remanded and continue in execution."

Where more creditors than one insist on the prisoner's detention, they are to pay him each not exceeding 1s. 6d. per week.

How if many creditors with his detention.

"And whereas many persons are often committed on attachment for not paying money awarded to be paid under submissions to arbitration by rules of court, or under submission to arbitration bonds, and which submissions have been made rules of the court, in pursuance of an act

9 & 10 W. 3. c. 15.

(a) An insolvent debtor has a right to his discharge if his groats be not paid before ten at night of the day on which they are payable; and this right is not waived by the turnkey on the felons side accepting them after that time. *Fisher v. Bull*, 5 D. & E. 36.

But where the turnkey received a French half-crown which the defendant refused to accept, it was held a good payment, as the turnkey did not object at the time. *Ibid.* 37. n.

(b) The groats are to be paid to the turnkey only, and not to the prisoner. *Imp. K. B.* 647.

“ passed in the 9th and 10th years of the reign of king William the Third, for determining differences by arbitration, and likewise for not paying of costs (a) duly and regularly taxed and allowed by the proper officer, after proper demands made for that purpose; and also upon any writ of *excommunicato capiendo*, or other process for or grounded on the non-payment of costs or expences in any cause of proceeding in any ecclesiastical court; it is hereby declared and enacted, That all such persons are and shall be entitled to the benefit of this act, and subject to the same terms and conditions as are herein expressed and declared with respect to prisoners for debt only.” 26 Geo. 3. c. 44. sec. 3. Also 33 Geo. 3. c. 5. f. 4.

Gaolers to give notice of this act to all debtors in their custody, &c.

on penalty of 50*l*

“ And it is further enacted, That all gaolers and keepers of prisons are hereby directed and required to give notice of this act to all persons in their custody for debt, within three days after such persons shall have been respectively committed or charged in execution, so as to make the same clearly and perfectly understood; and if any gaoler or keeper of a prison shall neglect to give such notice, according to the true intent and meaning of this act, he shall forfeit and pay to any person who shall sue for the same the sum of fifty pounds, to be recovered by him or her by action of debt, in any of his majesty's courts of record at Westminster, wherein no *essoign*, protection, *wager of law*, privilege, or *imparlance* shall be admitted or allowed; and in every such action the proofs shall lie on the person against whom the same shall be brought: Provided nevertheless, that such action shall be brought within six calendar months after the cause of action accrued.”

Sec. 4.

Time allowed debtors for taking the benefit of the recited act extended.

“ And be it further enacted, That where any debtors as aforesaid shall have neglected (b) to take the benefit of the said act within the time limited by the said act, and shall have remained in prison by the space of one year, and shall make it appear to the court out of which such execution issued, that such neglect arose from *ignorance or mistake* (c),
“ such

(a) A defendant in execution for the contempt and for the costs of a *quo warranto* information may be discharged under the lords' act. *Rex v. Pickerill*, 4 D. & E. 809. 1 D. & E. 266.

(b) A prisoner who has lost the benefit of the lords' act (32 Geo. 2. c. 28.) by the misconduct of an agent, may afterwards be discharged under the 26 G. 3. c. 44. f. 5. which provides relief for those who have neglected to take advantage of the former through ignorance or mistake. *Pearce v. Taylor*, 4 D. & E. 231.

(c) Where a prisoner has been brought into court to be discharged under the lords' act, and upon his examination the court have refused to discharge him, they will not afterwards discharge him on that act, though he make an affidavit of

of the discharge mistake not taken Thorburn

"such debtor shall then be entitled to take the benefit of the said act as if he or she had taken the same within the time by the act so limited as aforesaid." *Sec. 5.*

"Provided always, That it shall be lawful for any creditor or creditors, at whose suit any debtor shall be so in execution as aforesaid, to file interrogatories for the examination of such prisoner, before his or her being admitted to take the benefit of this or the before-recited act." *Sec. 6.*

Creditors may file interrogatories, &c.

"Provided always, That this act shall not extend to any debt or debts that may be owing to the crown, nor shall it affect any proceeding which at any time may be lawfully had under or by virtue of any commission of bankrupt."

Not to extend to debts due to the crown, &c.

It is to be observed, that by 32 G. 2. c. 28. s. 20. notwithstanding any discharge obtained by virtue of that act for the person of any prisoner, the judgment obtained against every such prisoner shall continue and remain in force, and execution may at any time be taken out thereon against the lands, tenements, rents, or hereditaments, goods or chattels, of any such prisoner, other than and except the necessary wearing apparel and bedding for himself and family, and the necessary tools for the use of his trade or occupation, not exceeding 10*l.* in value in the whole, as if he had never been before arrested, taken in execution, and released out of prison.

Subsequent effects of insolvents liable, but not their persons.

In order to warrant an execution on this statute, a *scire facias* seems to be necessary. *Buxton v. Mardin*, 1 D. & E. 80.

Sci. fa. necessary to warrant execution.

In the Common Pleas.

"A. B. against C. D.

"A. B.

"Take notice, that I intend, after the expiration of fourteen days from the date hereof, (or so soon after as I can be heard,) to petition his majesty's court of Common Pleas in Westminster for such relief and benefit as I am entitled to by virtue of an act of parliament made and passed in the 32d year of the reign of his late majesty king George the Second, intituled, *An act for the relief of debtors with respect to the imprisonment of their persons*, &c.; and also an act made and passed in the 33d year of the reign

Form of notice.

of circumstances in answer to the cause shown on his examination against his discharge, and that those circumstances were not then disclosed, owing to a mistake. The 5th sec. 26 Geo. 3. c. 44. is only meant to remedy a neglect in not taking the benefit of the lords' act within the time limited by that act. *Thornton and another v. Dunphy*, 1 H. Blac. 101.

" of his present majesty, intituled, *An act for the further relief of debtors, &c.*; and that I have no debts, estate, or effects whatsoever; nor had I, at the time of my first imprisonment in this action, or at any time since, either in possession, reversion, remainder, or expectancy, (other than and except what is contained in the schedule or inventory hereunder written,) the necessary wearing apparel and bedding for myself and family, and the tools or instruments of my trade or calling, not exceeding the sum of 10*l.* in value in the whole. As witness my hand this 20th day of June 1798.

" Witness E. F.

C. D."

Schedule.

" A schedule or inventory of all the estate and effects which I, C. D., a prisoner in execution, in the custody of M. N. esq. sheriff of the county of Norfolk, at the suit of O. P., or any person or persons in trust for me was or were possessed of or entitled unto at the time of my first imprisonment at the suit of the said A. B., or at any time since, either in possession, reversion, remainder, or expectancy, other than and except the necessary wearing apparel and bedding of or for me or my family, and the tools or instruments of my trade or calling, not exceeding 10*l.* in value in the whole. As witness my hand this 20th day of June 1798.

" C. D."

" Real estate—I have none either in possession, reversion, remainder, or otherwise. Goods—One table, 10 chairs. Debts—T. S. of Buckingham, farrier, 100*l.*

" Witness E. F.

C. D."

" To the Right Hon. Sir James Eyre, Knt. Lord Chief Justice of his Majesty's court of Common Pleas at Westminster, and the rest of the Justices of the same court;

" The humble Petition of C. D.

" Sheweth,

" That your petitioner is a prisoner in his majesty's gaol in and for the county of Norfolk, in execution, at the suit of A. B., for the sum of 60*l.* debt, and 63*s.* damages, as by the certificate annexed more fully appears.

" That your petitioner humbly apprehends he is entitled to the benefit of an act of parliament made and passed in the 32d year of the reign of his late majesty king George the Second, intituled, *An act for the relief of debtors with respect to the imprisonment of their persons, &c.*; and also of an act made and passed in the 33d year of the reign of his present

Form of petition.

" present majesty, intituled, *An act for the further relief of debtors, &c.*

" That your petitioner hath not at the time of exhibiting this petition, nor had he at the time of his first imprisonment in this action, or at any time since, any debts, estates, or effects whatsoever, either in reversion, remainder, or expectancy, (other than and except what is mentioned and contained in the schedule or inventory hereto annexed,) the necessary wearing apparel and bedding for himself and family, and the tools or instruments of his trade or calling, not exceeding the sum of 10*l.* in value in the whole.

" Your petitioner being willing and desirous to conform himself to the direction of the said several acts, most humbly prays your lordships to grant a rule or order of this honourable court for the plaintiff to shew cause why he should not be discharged, pursuant to the said acts; and as in duty bound will ever pray, &c.

" C. D."

N. B. This petition will serve for a prisoner in custody of the warden.

" I. K. of, &c. gentleman, maketh oath and faith, that he was present and did see C. D. the above-named defendant, sign his name (or mark) to the notice and schedule hereunto annexed, on the day of the date thereof, and also to a copy of the same, and that the name I. K. subscribed as a witness thereto is of the proper hand-writing of this deponent."

Affidavit to be annexed.

" L. M. of, &c. maketh oath and faith, that he this deponent did, on the day of June instant, serve the above-named plaintiff with a true copy of the notice (and schedule) hereunto annexed, by delivering the same to E., the wife of the said I. D., at his dwelling-house or place of abode, situate at Thetford in the county of Norfolk."

Affidavit of service of the notice and schedule.

Put the title:

If it be a country cause, or the defendant be in custody of any other gaoler (except the warden), then there must be an affidavit of seeing the gaoler sign the certificate, which will be as follows (and the affidavit of service of the rule, as well as that of seeing the gaoler's certificate signed, may be included in one affidavit):

" L. M. of, &c. maketh oath and faith, that he did see A. D. the keeper of his majesty's gaol or prison of, &c. sign the certificate hereto annexed, and that the name

Affidavit of seeing the gaoler sign.

Put the title. "A. D. set and subscribed at the foot of the said certificate
"is of the proper hand-writing of the said A. D."

How to proceed
thereon.

The petition and affidavit are to be engrossed on paper without a stamp, and to be sworn in town before a judge (pay nothing in the country to be sworn before a commissioner; annex also a copy of the cause from the gaoler in the country; if in custody of the warden, the clerk of the papers certifies). After affidavit sworn, leave it at the secondary's, who will give you a rule to bring up the defendant; and for the plaintiff to appear; pay 2 s. 6 d.; serve a copy on the plaintiff, and also on the gaoler; make affidavit on plain paper of such service, and at the same time of shewing the original rule as follows:

Affidavit.

"L. M. of, &c. gentleman, maketh oath and saith, that
"he this deponent did, on the day of last past,
"personally serve A. B. the above-named plaintiff with a
"true copy of the rule hereto annexed, and at the same
"time shewed to him the said original rule.

"L. M."

If at the assizes.

If this be to bring the prisoner to the assizes, the affidavit of the service of the rule is produced there.

SECTION VII.

Of Summons and Motion.

It is frequently necessary, in the progress of a cause, for the parties to apply, either by their attorney or counsel, to a judge at his chambers, or to the court in which their suit is pending, to obtain certain orders and rules agreeable to the urgency of their case; the first of which is procured by *summons*, and the last by *motion*.

Of proceeding by Summons.

Summons, how
taken out.

A summons may be taken out before any judge of the court wherein the action is brought; for which 1 s. is paid in term and 2 s. in vacation; and the same for every renewal thereof.

Service thereof.

A true copy of the summons must be served on the plaintiff or defendant's attorney; and if there be no attorney, on the parties themselves, or left for them at their last place of abode. As it may afterwards be necessary for the person serving same to swear to such service, he ought to examine it with the original.

At

At the hour appointed by the summons, the attorney taking out same ought to attend at judge's chambers, and wait half an hour for the attorney of the adverse party; if he does not attend by that time, then take out and serve a second summons, marking thereon *second summons*; upon which attend as before, and again renew the same, and serve it, marking the *third summons*, which, if not obeyed, make affidavit before the judge of having taken out and attended upon the third summons, and a judge's clerk will give you an order for the matter applied for. Pay for each order 2s., or sometimes more, according to circumstances, and serve same in like manner as the summonses.

Attendance thereon.

Formerly one hour's attendance was necessary; but now by rule K. B. Trin. 35 Geo. 3. an attendance on any judge's summons, for *half an hour*, next immediately following the return thereof, shall be sufficient.

If judge's order be disobeyed, and the party who applied for it would wish to enforce it by attachment, he must previously move to make the judge's order a rule of court; and then move for an attachment, which the court will, in some cases, award in the first instance; but generally a rule *nisi* is granted to shew cause why an attachment should not issue.

How, if disobeyed.

By rule Trin. 17 Geo. 3. K. B. it is ordered, "That attachments shall be absolute, in the first instance, only in the three following cases, *viz.* first, for non-payment of costs on the master's *allocatur*; 2dly, against a sheriff for not obeying a peremptory rule to return a writ, or to bring in the body; 3dly, for contempt of the court, in the execution of the process of the court."

If a judge's order be acquiesced in, it is as valid as any act of the court; but the validity of it may be impeached, either by moving the court to set it aside, or, if made in vacation, by applying the next term to set aside the proceedings had under it. Tidd, 270.

Of impeaching it.

Of proceeding by Motion.

A motion is an occasional application to the court by the parties or their counsel, in order to obtain some rule or order of court, which becomes necessary in the progress of a cause, or to get relieved in a summary manner even after the action is at an end, without the necessity of resorting to the more expensive and dilatory proceeding of an *audita querela*.

Motion, what.

A motion is usually grounded upon an affidavit, being a statement upon oath of the facts upon which the application to the court is made.

Affidavit necessary.

It is now ordered, that upon every affidavit sworn in this court, or before any judge or commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the *jurat*; and that no affidavit be read or made use of in any matter depending in this court, in the *jurat* of which there shall be any interlocation or erasure. R. Mic. 1796, K. B. And the court will take cognizance of affidavits sworn before foreign magistrates, if properly authenticated to them, as before the judges of Scotland or Ireland, and the like. *Dalmer v. Barnard*, 7 D. & E. 251.

Rule absolute.

The rule is sometimes absolute in the first instance, if the thing applied for is a mere matter of course; otherwise, it is only granted *conditionally*, to become absolute on a certain day, unless cause be shewn to the contrary; it is then called a rule *nisi*.

Rule nisi.

Service thereof.

A copy of the rule must be served on the opposite party; and, if no cause shewn on the day, it may be made absolute the next day, upon an affidavit of the regular service of the rule *nisi*.

Copy of rule and affidavits necessary.

If cause is intended to be shewn against it, a copy of the rule, and also of the affidavits on which it was granted, (and which are always left with the clerk of the rules till made absolute or discharged,) must be had from the office, otherwise the court will not permit any cause to be shewn.

Of shewing cause.

Sometimes cause is shewn upon the weakness of the party's own affidavit who obtained the rule; sometimes upon the facts to be disclosed in answer, and which are stated in an affidavit on the other side.

As the counsel's name who obtained the rule *nisi* is always put in the rule, it is the practice for the counsel on the other side to inform him of his intention to shew cause, and to shew him the affidavits with which he is furnished for that purpose.

How disposed of.

When cause is shewn, the party to shew cause begins, and the other answers; the court then decides according to the merits.

As to intitling affidavits.

The affidavits on each side should be properly intitled and stamped.

In criminal informations.

Affidavits on a motion for leave to file a criminal information ought not to be intitled; if they are, they cannot be read. The affidavits produced on shewing cause against the rule may or may not be intitled; but all affidavits made after the rule is made absolute must be intitled. *King v. Cole*, 6 D. & E. 642.

Lottery act.

Affidavits to hold to bail under the lottery act ought not to be intitled. *Ibid.*

I shall

I shall here take an opportunity of inserting some new cases which alter the practice as to intitling affidavits in motions of attachments, and setting aside attachments against the sheriff, as laid down Vol. I. Ch. iv. Sec. viii. (C), p. 200. It is there said, that on a motion for an attachment the affidavit should be intitled, *The King against the person to be attached*; but since that case it has been determined, that motions and affidavits for attachments in civil suits are proceedings on the civil side of the court until the attachments issue, and are to be intitled with the names of the parties: but as soon as the attachment *issues*, the proceedings are on the crown side; and from that time the king is to be named as the prosecutor. *Wood v. Webb*, 3 D. & E. 253.

In cases of attachments against sheriffs.

Different from practice as laid down in vol. I. p. 200.

So, if the attachment has been *granted*, though it has not in fact *issued*, the affidavit to set it aside must be on the crown side. *The King v. Sheriff of Middlesex*, 7 D. & E. 439. Or even if the motion be *to set aside the rule for granting the attachment*, the affidavit may be intitled, *The King v. the Sheriff of*, &c. 7 D. & E. 527.

Affidavits must not be sworn before a commissioner who is an attorney in the cause, except affidavit to hold to bail, agreeable to rule 15 G. 2. K. B.

Not to be sworn before commissioner attorney in cause.

A rule *nisi* to set aside proceedings for irregularity, and in the mean time proceedings to be stayed, operates as a suspension to the proceedings for all purposes till the rule is discharged. *Swayne v. Crammond*, 4 D. & E. 176.

Rule nisi.

Stay of proceedings.

If the affidavit on shewing cause is a positive contradiction, though false, the rule *nisi* will be discharged, the court cannot enter into the merits of the truth or falsehood of the fact; but the only step for the other side to take is to desire the affidavit may be filed, and indict the party making it for perjury.

Of filing affidavits.

If the application be such that the adverse party cannot be prepared to shew cause against it in time, as where he is obliged to send into the country for instructions, and cannot get his affidavit ready, or the like, he may move the court to *enlarge* the rule till some other day; but the court will be cautious of suffering this, if the other side is to be delayed by it (unless they consent); and if the party is in custody, they will scarce ever permit it.

Of enlarging the rule, and of peremptory rules.

If a rule is enlarged near the end of the term, it is sometimes ordered for the sake of expedition to shew cause at a judge's chambers.

All enlarged rules to shew cause, made in the term, must be moved before the last week of the succeeding term, unless leave for postponing them be particularly granted. R. Mich. 30 G. 2. K. B. And all enlarged rules to the next term shall be fixed to a particular peremptory day, *viz.* the first eight enlarged rules, either on the criminal or civil side, as

they may happen, for the first day; the next eight to the second day, and so on: and a list of them after every term to be made out and fixed up in the offices, and a copy thereof delivered to the judges the day before the beginning of every term. R. Hil. 6 Geo. 3. and R. Mich. 17 Geo. 3. K. B.

Costs of motion.

The costs of the motion are in the discretion of the court. In general, if the rule *nisi* is drawn up on payment of costs, if discharged, it is discharged with costs; but that is not always the case; nor, if made absolute, is it always made absolute with costs. The costs are often directed to abide the event; i. e. to be paid by the party who is ultimately unsuccessful in the cause.

But it is now ordered, that all rules for setting aside proceedings for irregularity with costs, if discharged generally, are to be understood to be discharged with costs. R. Mich. 1796, K. B.

When court will open rule.

If a rule be drawn up otherwise than as intended, it cannot be altered without a fresh application to the court, who will order the mistake to be rectified; so they will open any rule, and suffer cause to be shewn, if made absolute too soon, or by surprise, upon the opposite party, or the like.

Days appointed or the business.

For the better conducting the business of the courts, certain days are appropriated to certain purposes. Thus, Tuesdays and Fridays are called paper-days, and particularly set apart for arguing all causes set down in the paper, by the clerk of the papers.

Of special causes, how set down;

By Reg. Mich. Term 30 Geo. 2. all special causes, to be set down by the clerk of the papers of this court to be argued, shall be entered at least four days exclusive of the day of argument; of which notice shall forthwith be given to the attorney, or agent, on the other side; and that all such causes shall be argued in the order and course the same stand entered; and shall not be adjourned to any future day, by consent or otherwise, unless the court shall, for reasonable cause verified by affidavit, upon application to be made by either of the said parties, their attorney or agent, at least two days before the day of argument otherwise order; and all such causes remaining undetermined at the end of any term shall, without any new entry, be continued in the books kept by the clerk of the papers, to come on the next term in the order and course the same stand.

or adjourned.

Crown paper-days.

Wednesdays and Saturdays are appropriated to special cases and other business on the *crown* side; Mondays and Thursdays are open days for motions, or any business that may be appointed by the court to come on; and on the other days, after the civil paper or crown business is gone through, motions are heard.

High bar money paid into the box, upon mo-

In Trinity Term 33 Geo. 2. the court of K. B. took into consideration the petition of the poor prisoners confined on the common

mon side of the prison of that court, touching the money usually paid into the box of the court, upon motions and affidavits made in court, which the petitioners claimed as due to them.

tions and affidavits had disposed of.

And Mr. Athorpe (to whom it had been referred to examine into the matters alleged in the said petition) having reported to the court, "That he had made diligent inquiry into the premises, and that no living witness was upon such inquiry produced on the part of the petitioners who could give evidence touching the same; and that he had carefully inspected all the books, papers, and writings which could be found relative to the premises; and that, upon such inspection and inquiry, it did not appear that the said money was ever paid to the said poor prisoners, or for their use:" and Mr. Clarke, secondary on the plea side, having informed the court, "That during the time he had been in the said office, and also during the time his late father, Mr. Giles Clarke, (long since deceased,) was in the same office, the said money had been constantly paid by the secondary on the plea side into the hands of the junior judge of the court for the time being, in order to be by him paid over to the judges of the court, in equal shares, to be disposed of by them for such charitable purposes as they in their discretion should think proper." It was ordered, that the said petition be rejected.

To that liberality of sentiment which so eminently adorned the late accomplished and venerable Chief Justice of the King's Bench, the Earl of Mansfield, is the junior part of the bar indebted for the valuable privilege which they at present enjoy, of being enabled to bring the business of their clients before the court with equal expedition with their seniors in the profession.

New practice of King's Bench in hearing motions introduced by Lord Mansfield.

Before Lord Mansfield's time, the settled and general rule of the court was, to begin every day with the senior counsel within the bar, and then to call to the next senior in order, and so on, as long as it was convenient to the court to sit; and to proceed again in the same manner upon the next and every subsequent day, although the bar had not been half or perhaps a quarter gone through upon any one of the former days; so that the juniors were very often obliged to attend in vain, without being able to bring on their motions for many successive days. But that learned and ever to be respected judge was no sooner seated on the bench, than he established a different and far more equitable method; for he professed, and most punctually practised, the going quite through the bar before he would begin again with the seniors, even though it should happen to take up two or three more days before all the motions which were ready at the bar on the first day, could be heard. Burr. 58.

CHAPTER XVIII.

Of Error.

SEC. 1. *The Nature of the Writ of Error, and in what Cases it lies.*

SEC. 2. *Of proceeding in Error from the Common Pleas into the King's Bench.*

SEC. 3. *Of proceeding in Error from inferior Courts into the King's Bench.*

SEC. 4. *Of proceeding in Error from the King's Bench into the Exchequer Chamber,*

SEC. 5. *Of proceeding in Error in Parliament.*

SEC. 6. *Of proceeding in Error coram nobis, &c.*

SEC. 7. *Of proceeding in Error tam quam.*

SEC. 8. *Of proceeding in Error by Plaintiff to reverse his own Judgment.*

SEC. 9. *Of Summons and Severance in Error; of quashing Writs of Error; of the Abatement of Writs of Error; of amending Judgments after Error brought; and amending Writs of Error.*

SEC. 10. *Of False Judgment,*

SEC. 11. *Forms of the different Proceedings in Error and False Judgment.*

SECTION I.

Of the Nature of the Writ of Error, and in what Cases and into what Courts it lies.

Writ of error,
what.

WHENEVER the final judgment of the court is obtained, if either party be dissatisfied with it, the record may be removed by writ of error before a superior tribunal, in order to the reversal or affirmance of the former judgment.

A writ of error lies for some mistake, or supposed mistakes, in the proceedings of a court of record; for to amend errors or mistakes in a base court, not of record, a writ of false judgment lies, of which hereafter, Sec. x.

When it lies.

A writ of error is a writ of right in all cases but felony and treason, Salk. 504. and may be had against the king.

Error lies either in the same court where the judgment was, or in a superior court.—It lies in the same court where the judgment was given, when the error was not for any fault in the court, but for some defect in the process of the cause, other than in the judgment, or for default of a continuance, Dy. 196. a.; or for default in adjudging execution, 1 Rol. 176.; 7 Hen. 6.; 30 Yelv. 157.; F. N. B. 21. i.; as for misprision of the clerk, or for error in fact; and there the writ may be in the same court, 1 Sid. 208.; except where such error is in the Exchequer, 3 Lev. 38. But if there is error in law, or in the judgment of the court, then the writ lies to a superior court, and such writ of error only lies upon matter of law arising upon the face of the proceedings, so that no evidence is required to substantiate or support it; for if there has been an error in the determination of the facts in the cause, which it was the province of the jury to determine, the method of obtaining redress, in such case, is not by writ of error, but by an attaind of the jury, or appealing to the justice of the court to grant a new trial, in order to correct the mistakes of the former verdict.

When in same court.

When in a superior one.

A writ of error lies from almost all inferior courts of record in England into the King's Bench. But error does not lie from any inferior court in record in England into the Common Pleas, except in two or three cases; for which vide Com. Dig. Bac. Abr. &c. But the better opinion seems to be, that error lies not into C. B. in any case. In courts newly constituted, and which are empowered to proceed in a method different from the courts of common law, their judgment is not subject to a writ of error; but yet the King's Bench may examine them by certiorari or mandamus.

When it lies into K. B.

Q^y. Whether into C. B.

Till the late repeal of the declaratory act, 6 Geo. 1. c. 5. the House of Lords in Ireland had no jurisdiction of error from any court there; and error in a judgment in the King's Bench in Ireland lay immediately in the King's Bench here. But now the House of Lords in Ireland will be the dernier resort there, as it is in England.

No writ of error now from Ireland.

Errors in judgments, real and mixt, before the justices in their great sessions in Wales, lie in the King's Bench, by the 34 & 35 of Hen. 8. c. 26.

From courts in Wales.

And

From county
palatine.

And errors in judgments, in pleas *personal* there, lie also in the King's Bench, since the stat. 1 W. & M. c. 27.

If error is in the county palatine of Lancaster, the writ is directed to the chancellor or his deputy, commanding, that he give it in charge to the justices at Lancaster, that they send to him in his chancery the record, &c. and the writ which came to him thereupon, and that he transmit the record.

But if an erroneous judgment be given in Durham, in the chancery, upon proceedings according to the common law, or before the justices of the bishop, a writ of error lies before the bishop himself; and if he gives an erroneous judgment, error lies in the King's Bench. 2 Crom. 330.

From Cinque
Ports.

But error on a judgment in the Cinque Ports lies neither in the King's Bench nor Common Pleas; but by custom such judgment is examinable by *bill*, in nature of a writ of error, *coram domino custode, seu guardiano quinque portium apud curiam suam de Shepway*.

From court of
stannaries.

Nor does error lie in the King's Bench or Common Pleas on a judgment in the *stannaries*, but an appeal to the guardian, and from him to the prince; and if no prince, to the king's council. 2 Crom. 33b.

No writ of
error on non-
suit.

Where plaintiff has suffered a nonsuit, he cannot bring on that judgment; for though the record be ever so erroneous, he cannot after his default by suffering a nonsuit have judgment in his favour. *Kempland v. Macaulay*, K. B. 4 D. & E. 436. *Box v. Bennet*, C. B. 1 H. Blac. 432. But *Semb. contra.* Str. 235.

Who must be
parties in error.

It is a certain rule, that all the parties to the suit below must, in all cases of *error*, be made parties also in the writ of error; and in case of the death of a party, he must be named, and his death alleged in the *writ*. And if one refuses, he should be summoned and seivered. Carth. 7. Stra. 606. *Cooper v. Ginger*. See *post*, Section ix.

The defendant in the original action need not obtain a judge's order to change his attorney upon bringing a writ of error. *Batchelor v. Ellis*, 7 D. & E. 337.

SECTION II.

Of proceeding in Error from the Court of Common Pleas into the King's Bench.

(A) Of suing out Writ, and of Bail thereon, when requisite, &c.

(B) Of

(B) Of transmitting the Record, and herein of the *Scire Facias quare Executionem non.*

(C) Of non-prossing the Writ.

(D) Of alleging Diminution.

(E) Of assigning Errors, Joinder in Error, and of the Error Book; and of the *Scire Facias ad audiendum Errores.*

(F) Of the Judgment and Execution.

(A) Of suing out Writ, and of the Bail thereon.

(A)

If an erroneous judgment is given in the Common Pleas, the writ of error in all cases is made returnable into the court of King's Bench.

In order to bring error, the attorney for the party suing it finds the number of the judgment roll from the docket of the prothonotary's office, and thereby finds the roll in the treasury, of which he makes a copy, and thereupon the curfitor makes out the writ of error. Which may be sued out before judgment, but judgment must be given before the return of it. 3 Keb. 308. Vent. 96. Latch. 133.

How to procure writ.

For should it be made returnable before judgment given, it is such a fault as is not amendable. Str. 807. Jacques v. Nixon, 1 D. & E. 279.

Return thereof.

For the form of writ of error, and return thereto, see the forms at the end of this chapter.

When the writ of error is obtained from the curfitor, you must get it sealed, and then carry it to the clerk of the errors, and pay him his fee for the allowance of it, who will give you a notice in writing of such allowance; after which you should serve the other party's attorney with a copy of the writ and allowance thereof, which should be served immediately; for until it is served, it is no *superfedeas* to the execution; nor is it a *superfedeas*, unless bail be put in by the party suing the writ of error, provided it be a case that requires bail.

Allowance.

How for a superfedeas.

Of the operation of the allowance, and how a writ of error operates as a *superfedeas*, see Vol. I. Ch. xii. (I).

In order to prevent vexatious delay by frivolous writs of error, and to protect the party who has obtained a judgment, special bail is in many cases, by particular statutes, required to be given by the plaintiff in error; and perhaps it would be better if the legislature had made it requisite in all cases.

Of bail in error, required by different statutes.

The

31 Eliz. c. 3.
bail in error af-
ter outlawry.

The first statute requiring bail on *error* is the 31 Eliz. c. 3. sec. 3. which enacts, "That before any allowance of any writ of error, or reversing of any *outlawry* be had by plea or otherwise, through or by want of any *proclamation* to be had or made according to the form of this statute, the defendant in the original action shall put in bail, not only to appear and answer to the plaintiff in the former suit in a new action to be commenced by the said plaintiff, for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of *two terms* next after the allowing the writ of error, or otherwise avoiding of the said *outlawry*."

3 Jac. 1. c. 8.
bail in error in
debt on bond,
or for rent.

The next statute requiring *bail on error* is the 3 Jac. 1. c. 8. intitled, "An act to avoid unnecessary delays of execution;"—whereby it is enacted, "That no execution shall be stayed or delayed upon or by any writ of error, or *superfedeas* thereupon to be sued for the reversing of any judgment given in any action or bill of *debt upon any single bond for debt*, or upon any obligation with condition for the *payment of money only*; or upon any action or bill of *debt for rent*, or upon any contract sued in any of his highness's courts of record at Westminster, or in the counties palatine of Chester, Lancaster, and Durham; or in the courts of great sessions in any of the twelve shires of Wales, unless *such person or persons*, in whose name or names such writ of error shall be brought, *with two sufficient sureties*, such as the court (wherein such judgment is or shall be given) shall allow of, shall first, before such stay made or *superfedeas* to be awarded, be bound unto the party for whom any such judgment is given, by recognizance to be acknowledged in the same court, in *double the sum adjudged to be recovered by the said former judgment*, to prosecute the said writ of error with effect; and also to *satisfy and pay (if the said judgment be affirmed) all and singular the debts, damages, and costs, adjudged upon the former judgment; and all costs and damages to be also awarded upon the delaying of execution*."

Nature of recog-
nizance.

Explanation of
the statute.

To what cases
it extends.

The only cases provided for by this statute were, actions of *debt* upon any *single bond for debt*, or obligation with condition for *payment of money only*, or action of *debt* for rent, or upon any contract.

Bail therefore is not requisite upon bringing a writ of error upon a judgment in an action of debt founded upon a prior judgment, *Biddleston v. Whytell*, Burr. 1548.; because this is *casus omissus* out of this act, which is to be taken literally,

rally, and not extended by construction. *Ibid.* and 1 Blac. Rep. 506. *Biddleston v. Whytell.*

No bail is necessary in bringing in a writ of error upon a judgment in debt or bond conditioned for performance of covenants, or upon a bail-bond, because these bonds are not conditioned for the payment of money only.

Of bonds for performance of covenants ;

The condition of a bond was to perform covenants in an indenture ; and among the rest was one for payment of money, and the others were collateral ; and the breach assigned was for the non-payment of the money : yet, on error brought upon the judgment, no bail was taken ; for per Holt, this is not a condition for the payment of money only, but to do collateral acts. It is true, the breach assigned is for not paying the money ; and therefore the case upon the pleadings is the same as if the condition had been for the payment of money only, yet the condition is not for the payment of money only. Carth. 28.

or in part only for payment of money ;

The condition of a bond was to pay for so much beer as should be delivered to S. not exceeding 100*l.* After judgment upon demurrer below, error was brought. *Et per cur.*—No bail requisite. This sum was not certain even at the time of the action brought. *Thrale v. Vaughan*, Stra. 1190. 1 Wils. 19. S. C.

or to pay for goods to a certain amount.

Action upon an *infinimul computasset* in C. B. error brought in B. R. after judgment for the plaintiff ; and upon the question of bail being requisite, *per cur.*—This case is out of the statute, for the debt recovered did not accrue by any contract or other duty certain at first, but merely upon an account between the parties, which account has reduced divers uncertain sums to one certainty : therefore, as the action was founded upon the account, which is uncertain, this case is out of the statute.—The same law in debt, upon an award, when the arbitrators have reduced divers controversies to be recompensed by one sum : though this is a debt, yet it is not such a one as is intended by the statute, which must be a debt certain at first. Yelv. 227. 2 Bulst. 53.

Of an *infinimul computasset*.

The original action was in debt on bond conditioned to pay so much money as J. S. should declare to be due on an account ; and, after pleadings below, error was brought on the judgment. And by all the judges, except Keeling, the plaintiff in error must put in bail, or execution may go ; for this obligation is made for the payment of money only, which, though not certain when the obligation was made, is yet certain before the action brought. 1 Lev. 117. 1 Keb. 613. 690. *The Dean of St. Paul's v. Capell.*

Of bond to pay money to be awarded.

But

Of bottomree bonds.

But if the defendant brings error after judgment against him in an action upon a *bottomree bond*, he must put in bail; because the contingency having happened, this is now, in every respect, a bond for the payment of money. *Stra. 476. Pitt v. Coney.*

To pay money according to indenture.

Motion for leave to take out execution, no bail being put in on a writ of error brought by defendant, the action being in debt on bond, conditioned only for payment of money according to the true intent and meaning of an indenture, and not performance of covenants. On shewing cause, the court held that bail was required by 3 Jac. 1. If the bond had been generally for performance of covenants in an indenture, and the only covenant in that indenture had been for payment of money, bail must have been given on error. But the court gave time to put in bail. *Barnes, 98. Littleton, executor, v. Hanson.*

The condition of a bond was for payment of 500 *l.* at such a day, being the sum mentioned in certain indentures of such a date. And error being brought, the plaintiff in error would have been excused from giving bail, because the words of 3 Jac. 1. are, "*bonds for payment of money only*;" whereas, this was rather a bond for performance of covenants. But the court held, that bail ought to be given; for the material part of the condition was the payment of 500 *l.*, and the other words were only added to shew they were not distinct debts, but only different securities for the same. *Desbosdes v. Horsley, Stra. 959.*

Bonds given as collateral security.

A bond given by a third person, to a third person, as collateral security for a debtor's paying his creditors 15 *s.* in the pound upon a liquidated total of his debts, is a bond with condition for the payment of money only within this act; therefore bail requisite. *Burr. Rep. 4 pt. 746.* And its being payable by instalments makes no difference.

If bond be not within statute, but judgment by default, bail is requisite.

But if an action of debt be brought on a bond conditioned for the performance of covenants, and the defendant lets judgment go by default without craving *oyer* of the condition, and after brings error, he must put in bail; because it does not appear to the court upon the record, that the condition was for performance of covenants. This is the practice in B. R.

But in C. B. it is otherwise, as appears by the following case. Plaintiff declared in debt on a bond, of which defendant craved *oyer*; and the condition appeared to be for performance of covenants. Defendant after *oyer*, instead of pleading, entered *nil dicit*; in order that *oyer* of the condition appearing upon record, he might bring a writ of error

without

without bail. The court, on hearing counsel, set aside this entry, and gave plaintiff leave to enter judgment by default. And the question then was, whether the condition of the bond not appearing on record, bail ought to be required on the writ of error or not? And the court held, that the matter of bail is properly examinable by affidavit; and the bond being conditioned for performance of covenants, bail ought not to be required. *Spinks v. Bird, Barnes, 72.*

Motion for bail upon error in an action of debt on bond, conditioned for payment of 300 *l.* mentioned in a surrender of a copyhold by way of mortgage, and not for performance of covenants, wherein judgment had passed by default. *Per cur.*—There must be bail. This case is out of the stat. 16 & 17 Car. 2. but within the stat. 3 Jac. 1. *Barnes, 78. Woods v. Armstrong.*

It is to be observed, that the above statute of James extends to all such actions as are mentioned therein, whether judgment be after verdict or by default; but the two following statutes only extend to judgment after verdict; so that no bail is required on error to reverse a judgment by default, except it comes within the statute of James.

Statute of James extends to judgment by default.

The third statute requiring bail, is the 13 Car. 2. c. 2. (which after reciting the statute of 3 Jac. 1. in sec. 8.), sec. 9. enacts, "That no execution shall be stayed in any of the courts aforesaid, by any writ or writs of error, or *superfedeas* thereupon, after any verdict and judgment thereupon obtained in any action of debt grounded upon the statute made in the second year of the reign of the late king Edward the Sixth, for not setting forth of tithes; nor in any action upon the case upon any promise for payment of money, actions for trover, actions of covenant, detinue, and trespass, unless such recognizance, and in such manner as by the said recited former act is directed, shall be first acknowledged in the said court where such judgment is given."

13 Car. 2. In what cases bail required thereby,

after verdict.

Sec. 10. "Gives double costs to a defendant by delay of execution by reason of error brought, if the judgment be affirmed."

Double costs given.

Sec. 11. "Provides that the said statute shall not extend to actions popular; or upon penal statutes, indictments, &c. other than the statute of Edward the Sixth mentioned."

16 & 17 Car. 2.

The fourth statute requiring bail on error, is the 16 & 17 Car. 2. c. 8. sec. 3., which enacts, "That no execution shall be stayed in any of the aforesaid courts (a), by writ of error or *superfedeas* thereon, after verdict and judgment

In what cases bail required thereby,

after verdict.

(a) The same courts as are mentioned in the statute of James 1. viz. the courts at Westminster, courts of the counties palatine, and great sessions.

Dower.

Ejectment.

“thereupon, in any action personal whatsoever, unless a
 “recognizance, with condition according to the statute
 “made in the third year of king James the First, shall be
 “first acknowledged in the court where such judgment
 “shall be given:” and further, “That in writs of error to
 “be brought upon any judgment after *verdict* in any writ
 “of *dower*, or in any action of *ejectione firme*, no execution
 “shall be thereupon or thereby stayed, unless the plaintiff
 “or plaintiffs in such writ of error shall be bound unto the
 “plaintiff in such writ of *dower*, or action of *ejectione firme*,
 “in such reasonable sum as the court to which such writ of
 “error shall be directed shall think fit; with condition,
 “that if the judgment shall be affirmed in the said writ of
 “error, or that the said writ of error be discontinued on the
 “default of the plaintiff or plaintiffs therein, or that the
 “said plaintiff or plaintiffs be nonsuit in such writ of error,
 “that then the said plaintiff or plaintiffs shall pay such costs,
 “damages, and sum and sums of money as shall be awarded
 “upon or after such judgment affirmed, discontinuance, or
 “nonsuit had.”

And by sec. 4. “To the end that the same sum and sums
 “and damages may be ascertained, it is enacted, That the
 “court wherein such execution ought to be granted, upon
 “such affirmation, discontinuance, or nonsuit, shall issue
 “a writ to inquire as well of the mesne profits, as of the
 “damages by any waste committed after the first judgment
 “in *dower*, or in *ejectione firme*; and upon the return there-
 “of, judgment shall be given, and execution awarded
 “for such mesne profits and damages, and also for costs
 “of suit.”

Exceptions in
the statute.

Provided, “That this statute shall not extend to any writ
 “of error to be brought by any executor or administrator,
 “nor any action popular or upon a penal statute, (ex-
 “cept the statute of Edward the Sixth,) nor upon indict-
 “ments,” &c.

Plaintiff need
not enter into
recognizance;
two sureties
sufficient.

On error in *ejectment*, the plaintiff in error being in a re-
 mote part of the kingdom, found two sufficient men to be
 his bail, who were bound in a recognizance, &c. The court
 holding, that the intent of this statute of Charles the Second
 being to secure the defendant in error, it was here fully ob-
 served, because this bail was better than the plaintiff's own
 recognizance. *Barnes v. Bulver*, Carth. 121. *Goodtitle v.*
Bennington, Barnes, 75.

Bail was put in by plaintiff in error in *ejectment*, but he
 himself was not bound as required by the statute 16 &
 17 Car. 2., on which plaintiff below moved for leave to take
 out execution; and obtained a rule to shew cause. For
 plaintiff

plaintiff in error it was urged, that it is become the constant practice to give bail by sureties, and more for the advantage of defendant in error. *Per cur.*—Before the statute 16 & 17 Car. 2. no bail was required in *dower, ejectment, &c.* By the stat. 2 Jac. 1. bail was required in debt only. The stat. of Car. 2. extends to all personal actions after verdict, and requires sureties. In *dower*, real or mixt actions (and *ejectment* is a mixed action) after verdict it requires the party to be bound. This is a less security than by bail who justify, for the party is bound by the judgment. Bail in error cannot be put in before a commissioner in the country. The method of the statute cannot be followed without great inconvenience; and a better method, where the party lives at a distance from London, is substituted, and has been the practice ever since. Rule discharged. *Lushington and Doe on dem. of Godfrey, Barnes, 78.*

A recognizance on error in *ejectment*, ought to be in the value of two years *mesne profits*; and double costs is usually taken in both courts, *Barnes, 103.*; or in double the rent due if *ejectment* for rent. *Burr. 2501.*

Error on verdict in *ejectment* allowed, but plaintiff in error entered into no recognizance, nor put in bail, as plaintiff below had not got the costs taxed, without which the measure or *quantum* of the recognizance could not be fixed. Plaintiff below, for want of the recognizance and bail, in *four days*, took out an *habere facias possessionem*, and had possession given him, which the court held to be regular. *Et per cur.*—Defendant should have applied to stay execution, and then the court would have obliged plaintiff to have got his costs taxed. The writ of error is no *superfedeas* without bail. A judge would have taken bail, if applied to. Rule discharged. *Barnes, 212. Betts on dem. of Robson v. Egerton.*

If judgment be against an *executor or administrator de bonis propriis*, and he brings a writ of error, he must put in bail in such cases as are required by the statutes before mentioned, and pay costs if judgment be affirmed; but if judgment be *de bonis testatoris* only, he shall neither put in bail nor pay costs. *Vide* the proviso in 16 & 17 Car. 2.

Though an executor is not obliged to give bail on error, yet the court may take it; and if he does give bail, it is binding. *Stra. 745. Losere v. Johnson; Idem v. Emily.*

A *scire facias* against the defendant, as *administrator on a devassavit* alleged, and judgment was *de bonis propriis*; on which he brought error; and by the whole court, he shall find bail, for here he is charged in his proper goods, and it is not as where an *administrator* is charged in the testator's goods. 1 Lev. 245. 1 Sid. 368. 2 Keb. 295. 371.

To what amount bail to be given.

If no bail given.

Habere facias possessionem may be taken out.

In what cases executors to give bail in error.

When bail required upon error brought by bail;

After an award of execution against *bail* on a recognizance in error, they brought a writ of error as to such award of execution. Plaintiff moved for leave to take out execution for want of bail on the writ of error brought by the bail, and obtained a rule to shew cause, which was discharged; no bail in this case being requisite. Barnes, 194.

But in error on a judgment *after verdict* upon a *sci. fa.* against bail, there must be bail to the writ of error. 2 Blackf. Rep. 1227. And in this case held, that a *sci. fa.* is a personal action, and consequently within the statute 16 & 17 Car. 2. which requires bail on error of a judgment *after verdict* in any action personal.

er upon a recognizance in error.

Bail is not requisite, as it should seem, upon bringing a writ of error returnable in parliament upon a judgment in B. R. in action of debt brought upon a *recognizance in error*. Burr. 1567-8. But 2.

But upon error in parliament of a judgment affirmed in B. R. new bail is required. Salk. 97.

Of bail on error from inferior courts.

Formerly, upon error brought of a judgment in an *inferior* court of record, no bail was necessary, as not within either of the foregoing statutes: but now, by 19 G. 3. c. 70. it is enacted, "That no execution shall be stayed upon or by any writ of error or *superfedeas* thereon to be sued for the reversing of any judgment given in any inferior court of record, where the damages are under ten pounds, unless such person, in whose name the writ of error shall be brought, with two sufficient securities, such as the court (wherein such judgment is given) shall allow of, shall first, before such stay made, or *superfedeas* awarded, be bound unto the party for whom any such judgment is given, by recognizance to be acknowledged in the same court, in double the sum adjudged by the former judgment, to prosecute the said writ of error with effect; and also to satisfy and pay (if the said judgment be affirmed, or writ of error be non-prossed) all and singular the debts, damages, and costs adjudged; and all the costs and damages awarded for the delaying of execution."

When new bail required;

If a writ of error in B. R. on a judgment in C. B. is amended in B. R. new bail must be given to the amended writ in C. B. and the plaintiff below shall not take out execution for want of bail. *Rafael v. Veresh*, East. 16 Geo. 3. C. B. 2 Blackf. Rep. 1067. S. C.

So new bail must be put in on every new writ of error. *Ld. Ray.* 840.

As if on judgment in C. B. error is brought in K. B. and on affirmance of the judgment error is brought in parliament, the party must give a new recognizance, for the first does

does not include the costs to be assessed in the House of Lords. Sal. 97.

The plaintiff in error must put in bail within four days after the service of the allowance of the writ of error, provided such service of the allowance is not until after final judgment has been signed; but if such service of allowance be before final judgment signed, plaintiff in error has then four days from the signing of the final judgment, be it when it may. *Jaques v. Nixon*, 1 D. & E. 280.

And they are four *clear* days; so that if judgment be signed on a Monday, execution cannot issue for want of bail until the Saturday following. *Bennet v. Nichols*, 4 D. & E. 121.

The names of the bail, with their additions, are to be taken to the clerk of the errors, and entered in his book; he will meet you at any time appointed at the judge's house or chambers for this purpose, bring the bail, and he will take the recognizance.

When *bail in error* is put in, notice thereof ought to be given to the defendant or his attorney; and if the defendant does not except to those bail *within twenty days* after such notice, they shall be allowed. Reg. Mich. 5 W. & M.

In error.

E. F. v. C. D.

Take notice, that special bail was this day put in upon the writ of error brought in this cause, with the clerk of the errors, before the Hon. Mr. Justice Buller, at his chambers in Serjeants Inn, Chancery Lane, London; and their names are A. B. of, &c. and F. G. of, &c. Dated, &c. Yours, &c. T. S. attorney for plaintiff in error. To L. M. attorney for the defendant.

If the defendant in error thinks the bail insufficient, he may at any time, *within the twenty days*, have a rule from the clerk of the errors for better bail; and after service of such rule, if those bail do not justify in *four days*, or better bail not put in within that time, the defendant in error may sue out execution of his judgment below: but the *writ of error* still remains, and may be proceeded in, the *supersedeas* to the execution only being taken away. *Ld. Raym. 840.*

If a rule for better bail is served in vacation, the plaintiff in error need not in K. B. perfect his bail till the next term; but in C. B. he ought to justify before a judge, and execution sued out for want of it was held regular. *Barnes, 211.*

The same notice of justification in error is good as in common cases, *i. e.* if the same bail, one day; if different or added bail, two days; and clerk of errors will attend the court with his book; and rule for allowance of the bail

B b 3

must

must be drawn up at clerk of rules, and served. See Vol. I. Ch. iv. Sec. v.

To what
amount to
justify.

In error upon a judgment in debt on a bond in the penalty of 1470*l.* it was moved to justify bail, each in 1470*l.*; on the other side it was insisted, that the bail ought each of them to justify in double the sum the judgment was given for; but *per curiam*—The sum recovered is double the debt really due, and it is sufficient for the bail to justify each in the sum of 1470*l.* *Moor & Lynch* in error, Willf. 1 & 2. 213.

Bail in error, who refuses to justify, may have his name struck out of the bail-piece at any time. *Jones v. Tubb*, in error in B. R. 1 Willf. 337.

How if not
justified in
time.

If bail be not put in or do not justify, &c. in due time, execution may go; nor is there any occasion for any certificate from the clerk of the errors that no bail is put in. *Incedon v. Clark*, Bar. 212.

Nature of re-
cognizance in
Q. B.

The recognizance of bail in error in C. B. has not the condition incorporated with it, as with a recognizance of bail on a *capias ad respondendum*, but is subscribed by way of defeasance to it. Therefore a *scire facias*, setting out the recognizance, without the condition, was held good, on an issue of *nul tiel record* pleaded to it. *Malland v. Jenkins*, Barnes, 93.

Bail cannot
render;

Bail in a writ of error cannot surrender their principal in discharge of themselves; for the condition of the recognizance is, that the *plaintiff* in error shall prosecute his writ with effect; and, if judgment be affirmed, shall satisfy and pay the debt, damages, and costs recovered, together with such costs as shall be awarded by occasion of the delay of execution; or else that they, the bail, shall do it for him.

not be relieved
if plaintiff a
bankrupt.

So that if plaintiff in error becomes a bankrupt pending writ of error, bail cannot be relieved. *Southcote v. Braithwaite*, 1 D. & E. 624.

No rule to
transcribe till
justification.

If defendant in error excepts to the bail, and they give notice of justification, he must not give a rule to transcribe before they have justified.

(B)

(B) Of transmitting the Record; and herein of the *Scire Facias quare Executionem non*, and of *non-prossing* the Writ of Error.

Of the rule to
transcribe.

When bail are put in and justified, provided it be a case that requires bail, if not, upon the return of the writ; the defendant in error, if the record is not brought in, may take out and serve the plaintiff with a rule to transcribe, which must be served on plaintiff's attorney, or upon the plaintiff himself;

himself; service of rules to transcribe being an exception out of the general rule. *Green v. Upton*, Bar. 410.

The plaintiff in error then leaves a copy of the proceedings and judgment with the clerk of the errors, (having first docketed and carried in the roll,) for him to make up the transcript within the time specified in the rule.

It is an eight-day rule, within which time the record must be certified.

But though eight days are mentioned, which the officer is not to exceed, yet it is his duty to transcribe sooner if he can; and as soon as the record is brought into court, defendant in error may proceed upon it. *Sambridge v. Housley*, 2 D. & E. 17.

If the rule expires in vacation, and the record is brought in, it is as a record of the preceding term.

The transcript must be paid for by plaintiff in error; and if not paid for in due time, execution may issue, a certificate having been first obtained in writing from the clerk of the errors, that plaintiff has made default in transcribing. R. M. 28 Car. 2.

Though the record should not be transcribed, bail are liable, because they are bound to prosecute the writ of error with effect. *Roe v. Whitehead*, Bar. 499.

When the transcript is complete, it is delivered over by clerk of the errors, with the writ of error, to the signer of the writs (Mr. Webb) in the King's Bench office, the parties take copies thereof, and the cause is then said to be in the court of King's Bench. [For form of transcript, see forms at the end of this chapter.] The next step for defendant to take to accelerate plaintiff is to sue out a *scire facias quare executionem non*, which is a writ calling upon him to shew cause why execution should not be adjudged to the plaintiff. [For form thereof, see forms at the end of this chapter.]

If the record is brought in in vacation, the *scire facias* may be tested the last day of the preceding term, and made returnable the first day of the next. 2 D. & E. 17.

If not brought in till the first day of term, or within the term, it may be tested on the first day of the term.

There must be fifteen days between the teste and return of the *scire facias*.

It must be returnable on a general return day, if proceedings by original; if by bill, as against an attorney, then on a day certain. 2 Ld. Ray. 1417.

To the *scire facias* there must be either a *scire feci* or two *nihil*; if a *nihil* be returned, sue out an *alias scire facias*, fifteen days between teste of the first, and return of *alias*, is sufficient.

How transcript obtained.

Within what time.

May do it before.

How if rule expires in vacation.

Of paying for transcript.

Bail liable though no transcript.

Transcript to whom delivered.

Cause then in B. R.

Of the *scire facias quare*.

Its teste.

Its return.

Scire feci, or two *nihil*.

Of the alias.

Alias must not issue till return of *scire facias* tested on the return day, if proceedings by bill; if by original, on the *quarto die post*.

Scire facias need not lie in office.

A *scire facias* in error need not lie in the sheriff's office four days before the return of it, as a *scire facias* against bail must. *Gross v. Nash*, Burr. 2439. *Miller v. Ferraway*, Ib. 1723.

Whence *scire facias* must issue.

The *scire facias* is taken to sheriff's office, and return of *nihil* or *scire facias* thereon as in other cases.

No plea allowed to it.

The *scire facias* *quare* after transcript into B. R. must issue from that court. Bar. 432.

Of the rule on *scire facias*.

As this writ is only used as a method to bring the party to assign errors, no plea to it is allowed; nor will the court grant oyer of the *scire facias*, or suffer any answer thereto but an assignment of errors. Str. 679. *Miles v. Walsbam*, Mich. 3 Geo. 2. *Parker v. Staunton*, Id. Ray. 1414.

Upon the return of *scire feci*, or of *nihil* to the *alias*, give a rule on *scire facias*, thus:

In error.

E. F. v. C. D. rule on *scire facias*, T. S. attorney,

It is a four-day rule exclusive of the day given.

Intent thereof.

This rule is to bring the plaintiff into court as he has no day given him by the writ of error.

Of rule to assign errors; when to be given.

Then give a rule to assign errors; this may be given on the same day that the rule on *scire facias* is served, and will then both expire at the same time; both rules being consistent, for the same purpose of compelling plaintiff to appear and proceed. 2 D & E. 17.

Of nonprossing the writ; how to nonpross it.

But it has been since held irregular to rule the plaintiff in error to assign errors before the expiration of the rule to appear to the *scire facias*. *James v. Staples*, 6 D. & E. 367.

The only way of proceeding in order to nonpross the writ, and so get costs, is by serving rule on *scire facias*, and then a rule to assign errors; for without such rule to assign errors, a writ of error cannot be *nonprossed*. *Leith v. M'Farlane*, Burr. 1772. Nor can a rule to assign errors be given until a rule is served to appear on the *scire facias*. Str. 917. *Marshal v. Cope*.

Of execution and costs thereon.

But upon entering the rule to assign errors with clerk of the rules, and serving a copy thereof on plaintiff's attorney, if no assignment of errors are left with defendant's attorney, he may *nonpross* the writ and take out execution, and shall have his costs according to statute 8 & 9 W. 3. c. 11.

Of the entry on the rule.

For this purpose, defendant's attorney must enter all the proceedings on the roll, beginning with the transcript as of the

the term the transcript is of; sign judgment thereon at the King's Bench office on a proper stamp, tax costs, and sue out execution. [For form of *nonprofs*, see forms at the end of this chapter.]

Whereas if the writ of error be not regularly *nonprossed*, but plaintiff suffers judgment to pass upon two *nibils*, and does not assign errors before the rule on *scire facias* expires, though the defendant may sue out execution, yet he will be entitled to no costs in error, and the writ of error may still be proceeded upon. 2 D. & E. 17.

How if judgment by default without a *nonprofs*.

If the first writ of error is *nonprossed*, and then another brought, the court on motion will give leave to take out execution. King's Rep. 243.

If another writ brought after *nonprofs*.

Rule to shew cause why *nonprofs* of a writ of error, for want of transcribing the record, should not be set aside with costs. Objected, that no final judgment is entered, and therefore no transcript could be made. The *nonprofs* ordered to be set aside, but without costs. It appeared that the clerk of the judgments was paid his fee, by plaintiff's attorney, for entering the final judgment, which he had neglected to do; but plaintiff did not pray any rule against him. *Stone v. Rawlinson* in error, Barnes, 195.

When *nonprofs* set aside.

In *ejectment*, verdict was for plaintiff; whereupon defendant brought error, and entered into a recognizance to pay costs in case of *nonsuit*, *discontinuance*, or *affirmance*, pursuant to the 16 & 17 Car. 2. c. 8. sec. 3. and it was held, that when plaintiff in error is *nonsuited*, defendant need not bring a *scire facias* or *debt* on the recognizance, but may sue out an *elegit*. *Short v. Heath*, B. R. Mich. 12 Geo. 2.

How defendant to proceed after *nonprofs*.

(D) Of alleging Diminution.

(D)

If the plaintiff in error appears to the *scire facias* and proceeds, the next step is to assign errors.

An assignment of errors may be general or special; and in either case must be signed by counsel.

But it frequently happens that the errors assigned are the want of an original writ or a warrant of attorney, or some other matter necessary to render the record perfect or complete, which is termed *alleging diminution* of the record. [For form thereof, see forms at the end of this chapter.]

Diminution, why so called.

When this is done, the plaintiff in error prays a *certiorari* to issue to the proper officer to certify such original writ, warrant of attorney, or the like, which he ought regularly to get returned.

Of the *certiorari* thereon.

But as this assignment of error is frequently only for delay, and not founded in truth, it is necessary for the defendant to force

How to compel plaintiff in error to proceed.

force the plaintiff to proceed, and to get the *certiorari* returned. [For form of *certiorari* and return, see forms at the end of this chapter.]

Rule to return
certiorari;

what plaintiff
must do there-
on.

How defendant
to proceed.

If not returned.

Defendant may
confess the error;

but he cannot
himself get *cer-*
tiorari returned.

When *certiorari*
to be tested.

No second *cer-*
tiorari allowed
without mo-
tion.

For which purpose, the defendant in error may immediately get a rule for the master to return the *certiorari*, and serve the plaintiff's attorney with a copy thereof; upon which the plaintiff is obliged to make out the *certiorari*, to get it signed by the signer of writs, to leave it with the *custos breviarum* of Common Pleas, to certify, and to get it returned and filed with the clerk of Treasury at Westminster; where defendant's attorney at the expiration of the rule searches for it; and if found there, bespeaks a copy; but if not returned and filed within the four days, (the time of the rule,) the defendant may give a joinder in error of *in nullo est erratum*, and enter on the record a *non misit breve* without taking any notice of the diminution, and proceed to argument as in cases of demurrer, and the assignment of error as to that part is of no effect. Sal. 267.

But the defendant in error may come in *gratis*, and confess the error by reason of the want of an original, or the like, and then there is no occasion for a *certiorari* to be sued out and returned. Sal. 267. Ld. Ray. 1156.

But the defendant in error cannot himself at his own expence take out a *certiorari* and procure a certificate thereon; he can only serve plaintiff with a rule to return it; for the error is not completely assigned by plaintiff in error until the certificate is returned, by which it appears that there was no original, or the like, in the cause. Com. 115.

Certiorari must not bear teste before the errors are assigned.

Plaintiff brought a writ of error upon a judgment against him in C. P. by *nil dicit*; and assigned in Trinity term the want of an original, and the want of a warrant of attorney; and one *certiorari* was directed to the chief justice as to the warrant of attorney, and another *certiorari* to the *custos breviarum* as to the original, which bore teste the 21st of June, (which was before the errors were assigned,) upon which the *custos breviarum* returned that there was no original, &c. The defendant pleaded *in nullo est erratum*. And judgment was affirmed *nisi*, because the plaintiff in error ought to take out a *certiorari* to verify his error that there was no original; but this *certiorari* bearing teste before the assignment of the errors, could not be a *certiorari* upon that assignment of errors. *Bowers v. Mann*, Ld. Raym. 1554. Stra. 819.

After a *certiorari* has been returned, no second *certiorari* can issue without motion in court. R. E. 11 Car. 1.

If

If a variant original is returned on the first *certiorari*, the defendant in error may sue out a second *certiorari*. Salk. 266. But plaintiff in error cannot have a second *certiorari*. But see Leon. 22. Cro. Jac. 277. Bull. 21. Plaintiff in error took out a *certiorari* of a wrong term, which did not verify his error, and now he moved for a second *certiorari*, which was denied; the court saying it may be granted to affirm, but not to reverse a judgment. *Merryfield v. Berry*, Str. 765.

Plaintiff in error not allowed a second *certiorari*;

If a *certiorari* be prayed to certify an original, or a warrant of attorney of a wrong term, and the *chief justice* or the *custos brevium* return, that there is no original or warrant of that term, the defendant in error may make a suggestion of the right term, and pray a *certiorari*; which, when returned and filed, he may join in *nullo est erratum*, and enter it on the roll, paying the plaintiff's attorney 2s. 4d. for it.

but defendant is.

In what cases.

Want of original was assigned, and *certiorari* prayed, and return no original; afterwards the defendant applied to *Chancery*; and upon affidavit, that instructions were given to the *curfitor* for an original, but they were lost, the court of *Chancery* allowed, that the original should be supplied. Upon which the defendant in error prayed another *certiorari*, and an original was certified of the same term in which the default of an original was certified before; on which it was moved, that this was irregular; for, before the second *certiorari* was returned, the defendant ought to have given a copy of the original to the plaintiff's attorney; but the *master* informing the court, that the course was so when the second original certified was of another term, but not when it was of the same term, the motion was disallowed. Com. 118.

See also a case where defendant had a new *certiorari* in error upon a fine. 3 Leon. 106.

After *in nullo est erratum* pleaded, no diminution can be alleged, either by the plaintiff or defendant in error, without leave of the court.

But the court can *ex officio* award a *certiorari* to supply a defect in the body of the record, even after *in nullo est erratum* pleaded. Salk. 270. It is called a *certiorari ad informandum conscientiam*.

Court may at any time award one for their own information.

Want of original was assigned for error; the defendant, before the return of the *certiorari*, came in *gratis* and pleaded a release in bar, to which plaintiff demurred and defendant joined. *Per cur.*—The release is mispleaded for want of a *venue*, and it was agreed, that the court could award *ex officio* a *certiorari ad informandum conscientiam*, whether there was an original or not; *sed Holt cont.* Salk. 268.

If

What the court will intend in favour of judgments.

If error be assigned in the *original*, and upon a *certiorari* granted an erroneous original is returned; and upon this, in *nullo est erratum* is pleaded; and after, the court *ad informandum conscientiam*, grant another *certiorari* for another original; and upon this a good original is certified; the court ought to intend that this is the original upon which the judgment was given, in favour of judgments, which ought to be intended to be good. Cro. Car. 91. Style, 176. 2 Roll. Rep. 362. Godb. 407. Roll. Abr. 765.

On error of a judgment in *assumpsit*, by *nil dicti* in C. B. and writ of inquiry executed, and final judgment, plaintiff in error assigned the general errors, and also that there was no writ of inquiry or inquisition taken, filed, and remaining upon record in C. P. and prayed a *certiorari* directed to the *custos brevium*. To which he returned, that there was no writ of inquiry, &c. upon which defendant in error suggested, that there is a writ of inquiry in the custody of the *custos brevium* of the Common Pleas, of such a term assised, and prayed a *certiorari*. To which the *custos brevium* returned, that upon search he found the writ of inquiry, &c. and then defendant set out the writ of inquiry, &c. which warranted and agreed with the record. And thereupon pleaded *in nullo est erratum*. And for the plaintiff it was insisted that judgment ought to be reversed, because the *custos brevium* could not return a fact upon the second *certiorari* in every particular, contrary to his return upon the first. And the court cannot tell to which return to give credit. *Sed non allocatur*. For there being a positive return of a writ of inquiry, which warrants the record, we will take that to be true. And judgment was affirmed. *Shipman v. Lethieullier*, Ld. Raym. 1476.

What original returned will warrant the proceedings.

When all the proceedings are in one and the same term, an original of that term will warrant the same, but not otherwise. 1 Keb. 327. *Booth v. Beard*. But an original of the term final judgment is given will not warrant that judgment, if it appear upon the same record, that there have been proceedings of a precedent term. *Duke v. Sweeting*, 1 Will. 181.

Of the difference between originals and warrants of attorney.

The case of *originals* differs from *warrants of attorney*; for it is sufficient if a *warrant of attorney* be filed in any time pending the suit, let it be which term it will. The stat. of Hen. 8. only requires a warrant of attorney to be filed in the cause: and the 4 Ann. requires it to be filed according to the course of the court; and that is, to have it filed any time pending the suit; but it is otherwise as to an *original writ*, for if there be proceedings in the action in a term preceding the return thereof, the original of a term after will not support them.

Error

Error of a judgment from C. P. on a judgment by default, the error assigned was, that there was no warrant of attorney for the defendant (the now plaintiff) entered on the record below. It was objected, that a man shall not take advantage of his own neglect in not making proper entries. To which it was answered, that in a judgment by default, the plaintiff is to make up the whole record, and therefore it is his own laches. But the court ordered the cause to stand over, till the court of Common Pleas could be moved to amend the record; and afterwards the *chief justice* of C. P. directed a proper warrant of attorney to be filed and entered, and thereupon a new *certiorari* issued, and the judgment was affirmed. *French v. Cornelys*, 1 Blackf. Rep. 453.

If the error complained of is want of an original, or the like, and no *certiorari* is returned, court will not presume any thing against the judgment, as that it might be a bad original, or the like.

The case was error of a judgment in C. P. after a verdict. Want of *original* assigned for error, but no *certiorari* taken out to get the want of the *original* certified. *In nullo est irritum* pleaded. And when the cause came on in the paper, it was objected, that there ought to have been a *certiorari*, and a certificate made of the error; for it might be, that there was an ill original, and if that were returned the plaintiff in error might take advantage of that, and that would not be helped by verdict, though the want of an original were. *Per Holt, Ch. Just.*—If the want of an *original* be assigned for error, and the plaintiff in error does not take out a *certiorari*, and get a return to it, and the want of an *original* certified; the course is for the defendant to go to the master of the office, and get a rule for the plaintiff in error to return his *certiorari*; and if he does not get it done, as ordered by the rule, the assignment of error stands for nothing. But if the defendant in error will come in *gratis*, and confess the error, there need be no *certiorari* returned. And as to the matter, that there might be a bad *original*, &c. that is another sort of error; and when the want of an *original* is assigned for error, the court will never intend that there is a bad original, and judgment was affirmed. *Smith and others v. Stoneard*, Ld. Raym. 1156.

Attorney and his wife sued by writ of *privilege*, and had judgment by default, on which error was brought in B. R. and want of a writ of *privilege* assigned for error. A *certiorari* was taken out to make good the error, but was not returned. And the court were of opinion, that if this suit was by writ of *privilege*, it was ill; but they held that it does not sufficiently appear to them that it was by writ of *privilege*: for the

Defendant not to take advantage of his own neglect in not entering warrant of attorney.

Court will not presume any thing against judgments, if no *certiorari* returned.

Either that the original might be a bad one;

or that a writ of *privilege* was sued out wrongfully;

the recital in the declaration is not sufficient for them to found a judgment upon; but the writ of privilege ought to have been brought before the court, by the return to the *certiorari*; and therefore judgment was affirmed. *Drew & Un. v. Rose*, *Ld. Raym.* 1398.

or that there
was no original.

Error of judgment in C. P. after verdict in a suit against an attorney. General errors were assigned. And the plaintiff in error insisted that all actions in C. P. must be either by *original writ*, *original bill*, or *attachment of privilege*. But this action does not appear to have been by any of these ways, for which reason the proceedings were irregular, and therefore he prayed judgment. *Sed per cur.*—This being before us by writ of error, we cannot take notice whether there was any original bill or not, the defendant being sued as attorney, it not being assigned for error that there was no original bill. But in order to have taken advantage of this, the plaintiff in error should have assigned for error, that there was no bill, and took out a *certiorari*, and got it returned that there was none. Judgment affirmed. *Graddell and others v. Tyson*; *Ld. Raym.* 1441.

What may be
returned on cer-
tiorari.

Continuances cannot be returned upon the same *certiorari* with the *original*. *Salk.* 269.

If upon error, diminution, want of original, warrant of attorney, &c. is alleged, and a *certiorari* is sued out, upon which a record is returned contrary to what is before returned, it cannot be received. *Tyson v. Hylyard*, 2 *Ld. Raym.* 1122.

How to obtain
an original, if
judgment by de-
fault and error
likely to be
brought or ac-
tually brought
for want of one.

When judgment is by *default*, in which case only an original is necessary, (for after verdict the want thereof is cured by statute,) if defendant, now plaintiff in error, has actually brought a writ of error; before defendant in error gives a rule to transcribe, he must obtain an original: which can only be done by petition to the master of the rolls, and is granted upon payment of costs to the plaintiff in error, in case he does not further prosecute the writ. A copy of petition must be served with the master of the rolls' order thereon, on plaintiff's attorney, and after service costs should be tendered, which if accepted defendant may *nonpross* the writ, and sue out execution. [For form of petition, see forms at the end of this chapter.]

The master of the rolls' order is carried to the curfitor, with the *præcipe*, who makes out the writ returnable the term on which proceedings are entered on the roll, which is to be left with the sheriff of the county where *venue* is laid, and *nihil* returned thereto, and then carried to the *custos brevium* of Common Pleas and filed.

If plaintiff suspects defendant will bring a writ of error, he may, on the taxing of costs in original action, get the

original

original allowed by prothonotary, and then carry *præcipe* to curitor, and get it made out, and afterwards, if necessary, petition as above.

(E) Of assigning Errors, Joinder in Error, of the Error Book, and of the *Scire Facias ad audiendum Errores*.

(E)

The transcript on record ought to be entered by the *plaintiff* in error the same term it is brought into the office; but if he neglects so to do, the *defendant* in error may enter it.

Of entering the transcript.

And the *assignment of errors* by the plaintiff ought to be in the same term in which the record is removed. Lutw. 354. F. N. B. 20. g.

When errors to be assigned.

Otherwise the defendant may *nonpross* the writ of error after a *scire facias quare*, &c. and *alias* returned *nihil*, and a rule thereon given to assign errors, which *vide ante*.

The errors assigned must be signed by counsel, and must be assigned in term, and not in vacation. Prac. Reg. 203.

How to be signed.

And must be assigned upon the record.

Errors general or special.

An assignment of errors may be either general or special.

The plaintiff may assign for error, *error in fact* or *error in law*. F. N. B. 20. e. But he cannot assign both, for this will be double. 1 Roll. 761. l. 35. 1 Lev. 105. 76. 1 Sid. 147.

In fact or in law.

Nor can he assign several errors *in fact*, but he may several errors *in law*. F. N. B. 20. e.

In error from an *inferior* court, the plaintiff in error cannot allege diminution of the record. Sid. 40. 147. Nor can the defendant; but the court, if they see occasion, may award a *certiorari ad informandum conscientiam*.

What error from inferior courts.

Nor can he assign for error matter contrary to the record. Cro. Jac. 21. 1 Lev. 76. 1 Salk. 262. 1 Lev. 313. Cro. Jac. 244.

What may be assigned for error.

Nor matter which he might have pleaded. 1 Rol. 762. l. 40. Though judgment were by default. Though Dub. Cro. Jac. 547. But Carth. 124. says—Not matter which might have been pleaded in *abatement*.

An *assignment of errors* is in the place of a declaration in error, and must be engrossed and delivered over to the defendants on treble-penny stamped paper. [For the form thereof, see forms at the end of this chapter.]

How assignment to be engrossed, &c.

What are general errors and what special, see the abridgments and other books on the subject.

As soon as the *transcript* is entered and the *plaintiff* hath also assigned his errors, and entered the same on record; if the defendant does not immediately plead, or join in error;

Of the *sci. fa. ad audiendum errores*.

the

the plaintiff may sue out a *scire facias ad audiendum errores*. [For the form thereof, see forms at the end of this chapter.]

Effect thereof.

If the defendant in error does not come in and plead, or join to the assignment of errors upon the return of the *scire facias ad audiendum errores*, the plaintiff may have an *alias scire facias*, &c. and upon default thereto, the plaintiff in error must proceed to argument, and will be heard *ex parte*.

After judgment for the defendant, the plaintiff brought error and assigned infancy in defendant, and appearance by attorney, and then took out a *scire facias ad audiendum errores*; and after a *scire feci* returned, entered the default; and on producing the record, the judgment was reversed on motion, without making it a *concilium*, or putting it in the paper. *Walmsley v. Roson*, Stra. 1210.

Now disused, why.

But the writ of *scire facias ad audiendum errores* is now seldom sued out, as the defendant appears usually *gratis*, or the plaintiff in error, after his assignment of errors, takes a rule out for the defendant to appear thereto, and serves a copy thereof on the defendant. *Moseley v. Corks*, Carth. 40.

Of the joinder in error.

If the errors assigned are *special*, the joinder in error must be engrossed on stamped paper, and delivered over to the plaintiff's attorney: but if the errors assigned are *general*, the defendant's attorney may join in error directly, and deliver the common joinder *in nullo est erratum*, on a treble-penny stamped paper, to the plaintiff's attorney, paying him 2s. 4d. for entering the same on record.

Mansfield and Way.

Hilary term, thirty-sixth George the Third.

A. B. }
ats. } There is not any error.
C. D. }

Thomas Smith, attorney for the defendant in error.

The joinder need not be signed by counsel.

Effect thereof.

By pleading *in nullo est erratum*, the defendant admits the record to be perfect, and cannot afterwards allege diminution. 1 Salk. 270.

Now, if the error be in fact.

The joinder of "*in nullo est erratum*" to an assignment of error in *fact*, is a confession thereof, if the error in fact be well assigned; for if error in fact be assigned, and the defendant in error would deny it, he should not join *in nullo est erratum*; but ought to take issue upon it, so as to have it tried by the country. Sid. 93. Raym. 59.

But if the assignment is of an error in *fact*, and that be ill assigned, "*in nullo est erratum*," is no confession of it; as if it

it be assigned, that such a one at the time of the return of the *venire*, was not sheriff, and the record be removed; there, *in nullo est erratum* is no confession of that *fact*; because the record thereof is not in court, that being no part of the record, for the plea is *in nullo est erratum in recordo*. Cro. Jac. 12. 29. 521. Raym. 231. Cro. Car. 421. Roll. Abr. 758.

Also if an error in *fact*, that is not assignable, be assigned, and *in nullo est erratum* be pleaded, it is no confession; as if it be assigned, that on such a day there was no court sitting; because that is against the record, and then *in nullo est erratum* is only a demurrer. So if a man says, he did not appear, and the record says he did, *in nullo est erratum* is no confession, but a demurrer, because it is against the record. Bac. Abr. tit. Error, 2 vol. 218. and authorities there cited.

If the plaintiff in error therefore assigns error in *fact*, which is assignable, and the defendant would not confess it, he must not join *in nullo est erratum*, but plead thereto, and then the parties go to issue upon the error in *fact*, the record is made up, as in other cases, and the matter goes to a jury.

But where the defendant joins *in nullo est erratum*, the parties thereupon are at issue in law for the determination of the court; and in such case either of them may enter the same on record, and move for a *concilium*, or day, for arguing the errors. Then the cause for argument must be entered with the clerk of the papers, and error-books made up and delivered to the respective judges of the court, in like manner as upon argument of a *demurrer*.

Two days at least before the cause comes to be argued, paper-books must be delivered to the judges. 2 Jac. 1. Though that rule of court says *four days* before, yet the practice has been for a long time past to deliver the paper-books only *two days* before.

The plaintiff in error delivers paper-books to the chief justice and the senior judge; the defendant to the two junior judges.

The court will not hear arguments unless books be delivered to all the judges; therefore it behoves the attorney who expects the judgment of the court to be for his client, to deliver all the books, especially as he will be allowed in his costs for the copies he makes for the other side. Mich. 17. Car. 1.

The court has refused to hear any argument on the side of the party who hath neglected to deliver books, though he has been willing to pay the other side for them.

If plaintiff's attorney therefore neglects to deliver his books, let defendant in error deliver all, and judgment will of course be given against plaintiff.

Defendant should plead thereto, and go to trial.

How, if the error be in law.

Of paper-books, &c.

It is usual to deliver 10 copies of the paper-books to the judges.

Give brief to counsel, with one guinea to pray judgment when it is called on.

What they must obtain.

The paper-books are a copy of the entry on the roll, which must be of the whole proceedings, beginning with the writ of error to the end of final judgment in C. B. and then the assignment of errors and joinder intitled As yet of — Term, 36 Geo. 3. (the term the transcript is of).

How to proceed on getting judgment.

When judgment is obtained, get rule from clerk of rules, on which the master will tax costs, and afterwards mark the roll, which must be had of the clerk of treasury for that purpose.

(F)

(F) Of the Judgment and Execution.

What judgment court should give on error.

If a judgment be below for the plaintiff, and error is brought, and that judgment reversed; yet, if the record will warrant it, the court ought to give a new judgment for the plaintiff. Cro. Car. 443. Salk. 401. Hob. 194. But if the judgment be erroneous and against the plaintiff, that ought to be reversed, and no new judgment given for the plaintiff. *Ibid.*

If any erroneous judgment be given for the defendant, and that is reversed, and the merits appear for the plaintiff, he shall have judgment. But if the merits be against the plaintiff, the defendant shall have a new judgment. So it is in the Exchequer Chamber, for they are to reform, as well as to affirm or reverse it. *Ibid.*

But in Salk. 262. it is laid down, that where the plaintiff brings the writ of error, and the court reverses the judgment below, they give a new judgment for the plaintiff; but otherwise if the defendant below brings the writ of error, for then they only reverse it. So in Burr. Rep. 2156. if error is brought by the plaintiff below, the court upon the reversal of the judgment, may give such judgment as the court below should have given: but if error is brought by the defendant below, the court can only reverse it. S. P. *Wyvill v. Stapleton*, Stra. 617.

And per Lord Mansfield, in *Cuming v. Sibley*, Burr. 2498. where the plaintiff below brings a writ of error, we may not only reverse what is wrong, but give judgment for what is right. Where the defendant below brings a writ of error, we only reverse such wrong part of the judgment as he complains of.

Of reversing it in part and affirming in part.

A judgment cannot be reversed in part and affirmed in part, unless part is by common law and part by statute. Salk. 24. As where in *assumpsit* and two several counts laid one on a promissory note, on which plaintiff had counted a

on a bill of exchange upon the custom of merchants. *Non assumpsit* was pleaded, entire damages given, and judgment given accordingly. And on error brought in B. R. it was held, 1. That plaintiff could not declare on a promissory note, as on a bill of exchange, and as there could be no such count or action, so there could be no such damages. 2. That they could not reverse the judgment in part, viz. as to one count, and affirm it as to the other, and denied the case of *Jacob v. Will*, Hob. 6. and took the difference above, viz. where the judgment is partly by the common law and partly by statute, it may be reversed in part; for that which was a judgment at common law, will remain a judgment, and be complete without the other.

If on error brought into B. R. of a fine in C. B. the same is reversed, a *certiorari* goes for the foot of the fine, and it is cancelled in B. R. If it is affirmed the transcript is remitted into C. B. because there is no chirographer in B. R.

Upon affirmance of the judgment, the *defendant* in error may take out his execution, either a *fi. fa.*, *ca. fa.*, or *elegit*, which writ of execution recites the former judgment below, the removal of the record into the court above, and the affirmance thereof, together with the costs given upon the affirmance.

The writ of execution must go into the county where the original *venue* was laid, and if in any other county, a *testatum* is to issue, for which the first writ must issue and be returned.

Although on a writ of error from the Common Pleas a transcript only is removed into the King's Bench, yet the King's Bench award execution. Cow. 843.

When judgment is reversed, the party shall be restored to all that he has lost, and a writ of restitution shall be awarded. 2 Cro. 698. 14 Mod. 161. [For form thereof, see forms at the end of this chapter.]

Where the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reversed; there, because it appears on the record that the money is paid, the party shall have restitution without a *scire facias*, and there is a certainty of what was lost; otherwise where it was levied but not paid, there must then be a *scire facias* suggesting the matter of fact, viz. the sum levied, &c. But where judgment is set aside after execution for irregularity, there needs no *scire facias* for restitution, but an attachment shall be granted upon the rule for contempt. Anon. Salk. 588.

How if error be on fine.

Of the execution on affirmance.

Where it must go.

Of the testatum.

By what court awarded.

Of the writ of restitution.

When *sci. fa.* necessary.

SECTION III.

*Of proceeding in Error from inferior Courts into the King's Bench.*Jurisdiction of
K. B.

The court of King's Bench by its constitution, has a superintendancy over all inferior jurisdictions, so that whenever there is any error in the proceedings of an inferior court of record, a writ of error lies into the King's Bench; except in a very few instances, mentioned in the first Section of this Chapter. [For jurisdiction of this court, see Introduction to Vol. I.]

The mode of bringing and prosecuting such writ of error is as follows:

How writ of
error procured.

Let the plaintiff in error make application to the curfitor for a *writ of error*, which writ may bear *teste* before the judgment given; and this is the usual course for preventing and superseding the execution; but then judgment below must be given before the return of it. 3 Keb. 308. Vent. 96. Latch. 133. For if it should be made returnable before judgment given, it is such a fault as is not amendable. Stra. 807.

Allowance and
superfedeas.

Make out *præcipe* for curfitor, who will prepare writ of error returnable in the King's Bench.

As soon as the writ is made out, the party who sued it must carry it to the *prothonotary* of the inferior court, and get it allowed; and if execution should have been sued out, that officer will also grant a *superfedeas* to the same; but if no execution should have issued, the allowance of the writ of error is of itself a sufficient *superfedeas*, and no execution can then be taken out.

Bail thereon.

Now, by the stat. 19 Geo. 3. c. 70. bail in error must be put in on all writs of error from inferior courts. For the time and manner of putting in bail, see *ante*, Sec. ii. (A).

Rule to trans-
scribe.

On the return of the *writ of error*, the *defendant* in error should serve the *plaintiff* in error with a rule out of the inferior court to transcribe the record, who, upon service thereof, should bespeak the transcript of the record of the proper officer below, and carry the same into the office, and file the same, if in B. R. with the *signer of the writs*, who is the proper officer for this purpose.

Of writ of exe-
cutio judicii.

The transcript should be filed before the second seal, or the *defendant* in error may apply and get a *certificate* from the office, that the *writ of error* is not returned, and the transcript brought in; and may thereupon apply to the *curfitor* for a writ of *executio judicii* directed to the court below, and

com-

commanding them, that, notwithstanding the writ of error, they proceed to execution on the said judgment.

But if the transcript is brought in, the cause is then in the court of King's Bench, and defendant proceeds to sue out a *scire facias quare executionem non*, and in all other respects the parties pursue the same steps as are directed to be taken in proceeding in error from the Common Pleas into the King's Bench; for which see *ante*, Sec. ii. (B), (C), (D), (E), (F). [And for the forms of the writs, &c. see forms at the end of this chapter.]

Of subsequent proceedings.

SECTION IV.

Of proceeding in Error from the King's Bench into the Exchequer Chamber.

Formerly no writ of error lay of a judgment in the King's Bench but in *parliament*, and as the subjects were often disappointed of their writ of error by the parliament not sitting, or by their being employed in public business when they did sit:

By the 27 Eliz. c. 8. it was enacted, "That where any judgment shall, at any time hereafter, be given in the said court of the King's Bench, in any suit or action of debt, detinue, covenant, account, action upon the case, ejectione firmæ, or trespass, first commenced there, (other than such only where the queen's majesty shall be party,) the party plaintiff or defendant, against whom any such judgment shall be given, may, at his election, sue forth out of the court of Chancery a special writ of error to be devised in the said court of Chancery directed to the chief justice of the said court of the King's Bench for the time being, commanding him to cause the said record, and all things concerning the said judgment, to be brought before the justices of the Common Bench, and the barons of the Exchequer into the Exchequer Chamber, there to be examined by the said justices of the Common Bench, and barons afore-said; which said justices of the Common Bench, and such barons of the Exchequer as are of the degree of the coif, or six of them at the least, by virtue of this present act, shall thereupon have full power and authority to examine such errors as shall be assigned or found in or upon any such judgment; and thereupon to reverse or affirm the said judgment as the law shall require, other than for errors to be assigned or found for or concerning the jurisdiction of the said court of King's Bench, or for any want of form

This court instituted by 27 Eliz. c. 8.

In what cases this writ of error lies.

"form in any writ, return, plaint, bill, declaration, or other pleadings, process, verdict, or proceeding whatsoever; and that after the said judgment shall be affirmed or reversed, the said record, and all things concerning the same, shall be removed, and brought back into the said court of the King's Bench, and such further proceeding thereupon had, as well for execution as otherwise, as shall appertain."

This statute only gives the party his option in such cases, of bringing his error in Parliament or the Exchequer Chamber (a).

Construction of statute.

The writ of error can only be returnable in the Exchequer Chamber in the seven cases mentioned in this act, where the suit was first commenced in B. R. Therefore if a suit is by original in B. R. a writ of error on a judgment thereon must be returnable in Parliament, and cannot be in the Exchequer Chamber, because such a suit is not recommended there, but in Chancery, where the original writ is purchased.

No writ of error here unless suit by bill.

A writ of error therefore can only be returnable on judgments in B. R. in actions of debt, detinue, covenant, account, action on the case, ejectment, and trespass, first commenced in B. R. which must be by bill. 3 Salk. 148.

Not thoroughly explained.

This is the construction which seems uniformly to have been put upon the statute, though in Comberb. 295. Holt, Ch. Jus. says, "It hath obtained that no writ of error lieth in the Exchequer Chamber where the action was commenced here by original, but I never understood the reason of it; the statute says first commenced here." Doug. 352. n.

To what actions the statute extends.

Though the words "action on the case" are general, and seem to comprehend every action on the case, yet it hath been held, that this statute does not extend to the action of *scandalum magnatum*, although that is an action upon the case: so that error does not lie in *cam. seacc.* by force of this statute of Elizabeth. For the statute of *scand. mag.* 2 Rich. 2. c. 5. was made for the preservation of the public peace; and besides, an action thereon is of an higher nature than an

(a) It is to be observed that there are three distinct courts of Exchequer Chamber. The one is by the common law holden before the twelve judges, for the determination of any matter of great doubt and importance, or any cause adjourned there when any court is divided in opinion, or any special verdict found in any criminal case. The other two are constituted by acts of parliament, the one by 31 Edw. 3. c. 12 consisting of the chancellor, treasurer, and justices of each bench, who are empowered by writ of error to review the judgments given in the common law court of the Exchequer, its decrees in equity being subject to appeal only in the House of Lords; and the other by the stat. 37 Elis. consisting of the justices in C. B. and barons of the Exchequer, who have authority by writ of error to reverse or affirm judgments in K. B. not so generally as that created by the stat. Edw. 3. but in certain actions expressly enumerated and commenced as therein specified. 1 Woodeson Est. 122.

action

action upon the case, be founded specially on a statute. Cro. El. 142. Id. Raym. 954.

But the statute extends to an action of debt on the statute of usury, though a penal action. *Lloyd qui tam v. Shutt*, Doug. 320.

The Exchequer Chamber, under this statute, hath nothing to do with errors in fact. 2 Lev. 38. 1 Vent. 207. 2 Mod. 194. Com. Rep. 597.

This writ of error is obtained of the *curfitor* in like manner as all other writs of error are; and by Reg. East. 36 Car. 2. every attorney who shall sue out any writ of error on any judgment of this court returnable in the Exchequer Chamber, shall forthwith allow such writ of error with the clerk of the errors of this court for the time being, and no execution shall be stayed until such allowance.

And where special bail is required, if the plaintiff upon such writ of error does not *within four days* after the allowance thereof put in *special bail*, the plaintiff in the action may proceed to take out execution, notwithstanding such writ of error. Same rule.

If special bail is put in, the plaintiff in error, or his attorney, must forthwith give notice to the defendant in error, or his attorney; and if the defendant in error does not except against such bail *within twenty days* after such notice, such bail shall be allowed. Mich. 5 W. & M.

For the manner of putting in and excepting to bail, &c. see *ante*, Sec. ii. (B).

When bail put in, if any required, if not upon the allowance of the writ of error, give a rule to transcribe, if plaintiff in error means to proceed, let him obtain transcript as directed *ante*, Sec. i. (B). Pay the transcript money, and get it examined and complete within the time of the rule, which is eight days. The transcript is delivered over to the clerk of the error of the Exchequer Chamber: all the rules, until the making up and delivering over the transcript, are given by the clerk of the errors; but after delivery of the transcript, all rules, &c. are given by the clerk of the errors of the Exchequer Chamber.

All writs issuing out of the Exchequer Chamber are witnessed by the chief justice of the Common Pleas.

In the next term (the second) apply to clerk of errors of Exchequer Chamber for a rule to allege diminution, which is to be served on plaintiff in error. It is an eight-day rule from the service, if plaintiff does not allege diminution; upon affidavit of the service of the rule, clerk of errors will sign *non prof.* or he will send to plaintiff's attorney, which is more usual; and if no answer the next morning, he will

To qui tam actions.

No writ for error in fact.

How writ obtained and allowed.

Of bail thereon.

Excepting thereto, &c.

Rule to transcribe.

After transcript of whom rules got.

Of alleging diminution.

Of the non prof.

sign non prof. But if plaintiff in error does not allege diminution, defendant the next term (the third) gets a rule from clerk of errors to assign errors and serves copy thereof on plaintiff's attorney. It is an eight-day rule from the service.

Of assigning errors.

Plaintiff may assign common errors or special ones in same manner as described *ante*, Sec. ii. So if he alleges diminution, he gets *certiorari* returned as therein above described.

Of joinder in error.

In the fourth term, defendant may plead in *nullo est erroratum*, set down the cause, move for judgment, and four days after affirmance, get the costs taxed, and sue out execution; but before the writ of execution is returnable, apply to clerk of errors in Exchequer Chamber for transcript, which must be taken to the King's Bench treasury.

Of the notice for arguing errors.

But if the *plaintiff* in error, after errors assigned in the Exchequer Chamber, intends to argue the same, he must give ten days notice to the *clerk of the errors* there, before they shall be argued; and copies of the paper-book in error must be made and delivered by the parties. The *plaintiff in error* delivers books to the judges of the Common Pleas, and the *defendant* to the barons of the Exchequer four days before the hearing of the cause. R. Cart. 33 Car. 2.

Of the return days in Exchequer Chamber for argument, &c.

In the Exchequer Chamber, there are only two return days in each term, one the *general affirmance day*, appointed by the judges of that court for the general affirmance or reversal of judgments, and held a few days after the beginning of the term. The other, called the *adjournment day*, held a few days before the end of the term, which is for finishing any business left undone on the former day. Causes may be set down for the latter day, but the fees are much higher, and they must be set down two days before the adjournment day. Imp. K. B. 678.

Transcript only sent, why so.

It is observable, that the practice has always been to send only a transcript of the record into the Exchequer Chamber; but by the statute, the *record* is to be brought there. Doug. 352. n.

Of the remittitur.

As the transcript however is only sent, it is absolutely necessary, whenever judgment is given in the Exchequer Chamber, that the transcript be sent back to the King's Bench, and a *remittitur* entered; for execution thereon must issue out of the King's Bench.

When necessary.

So, if a writ of error abates in *cam. scacc.* or is discontinued, there must be a *remittitur* entered in B. R. for without such *remittitur* it cannot appear to the court of King's Bench, but that the writ of error is still depending in the Exchequer Chamber. But if it appears that a *remittitur* was entered, the court will not examine into the time of the entry. Carth. 237. 2 D. & E. 737.

If error is brought by many in the Exchequer Chamber, and some die, a *remittitur* should be entered to warrant execution in B. R. against the survivors. Carth. 236.

Upon a special verdict, the judgment was in B. R. for the defendant, which judgment was reversed in the Exchequer Chamber. Besides the reversal, that court gives a complete judgment for the plaintiff, viz. *that he do recover*. Carth. 319. Id. Raym. 10.

Judgment for defendant on demurrer was reversed in the Exchequer Chamber; and judgment *that the plaintiff do recover was given*, &c. But because that court had not power to award a writ of inquiry, it was sent into B. R. for the execution of that writ, and thereupon to give final judgment. *Vide* Carth. 319. Ld. Raym. 10. and authorities there cited.

If the plaintiff recover a judgment against two defendants in B. R. and one of them bring a writ of error in *cam. sec.*, the plaintiff cannot charge the other defendant in execution till the record be remitted into the court of B. R. notwithstanding the writ of error might have been quashed immediately because not brought by both defendants. *Laroche v. Washbrough and another*, 2 D. & E. 737.

For costs in error, and in what cases interest will be allowed, see *post*. Ch. xxi.

SECTION V.

Of proceeding in Error returnable in Parliament.

If a judgment apprehended wrongful and illegal be given in the King's Bench, or even in the Exchequer Chamber, the party thinking himself aggrieved may upon a petition of right made to the king, (which petition is not, says Sir Edward Coke, *ex debito justitiæ*, but for decency, because such judgment was *coram rege*, and which form having been thus introduced is still preserved,) and upon his answer thereunto "*fiat justitia*," have a writ of error directed to the chief justice of the King's Bench for removing the record without delay, in *præsens parliamentum*, and thereupon the roll itself and a transcript in parchment is to be brought by him into the Lords' House; and after the transcript is examined with the record, the chief justice carries back the record itself into the King's Bench; and then the plaintiff is to assign the errors. This assignment of errors is to be in writing, and left with the clerk of the parliament. The adverse party denies that there is any error, and prays, "That the court

Nature of the proceedings.

" of

" of our lord the king, before the king in his parliament,
 " may examine the record, process, and matters for error
 " assigned, and that the former judgment may in all things
 " be affirmed." This is called *joinder in error*. Questions
 of fact are not examined in this channel of jurisdiction.

In whom the
 judicial power
 resides.

The judicial power is only in the lords; but legally and
 virtually it is the judgment of the king, as well as of the
 lords, and perhaps too, says Chief Justice Holt, of the com-
 mons; although it was declared in the first year of Henry
 the Fourth, that all judgments appertained to the king and
 lords, and not to them.

The dernier re-
 sort.

The cause is determined by the majority of the lords pre-
 sent, however small the number, no proxies being allowed,
 and their determination is final, this being the *dernier*
recourt.

Its antiquity.

This resort to parliamentary decision by writ of error, to
 revise judgments at law, is of the earliest antiquity; not
 owing its origin to any positive statute, nor determinable to
 any certain period. It seems indeed, by the principles of
 our government, hardly capable of restraint or diminution.
 The stat. 4 Hen. 4. c. 23. which was passed to prevent the
 irregular re-examination of judgments given in the king's
 courts, and which recites as the grievance to be remedied,
 that, after such judgments, parties were brought sometimes
 before the king, sometimes before his council, and some-
 times before the parliament, expressly saves the proceeding
 by writ of error, which exception refers (notwithstanding the
 former expressions) to this high tribunal, as well as to infe-
 rior judicatures. This judicial supremacy of the lords was
 at all times before and since the passing of that law alike un-
 disputed and undoubted.

What judg-
 ments examin-
 able by this
 writ.

The judgments which are immediately examinable by writ
 of error in parliament, are given in the King's Bench, or
 in one of the several courts of Exchequer Chamber. See
 note, p. 518.

How if action
 in King's Bench
 by original.

How if by bill.

If an action be prosecuted in the King's Bench by original
 writ out of Chancery, recourse must be had directly to the
 House of Lords; but in cases where the stat. 27 Eliz. c. 8.
 allows the Exchequer Chamber thereby created, to interpose,
 it only gives the election to the party thinking himself ag-
 grieved, and does not take away the common law method of
 relief in parliament. Indeed it has been doubted, whether
 this court of Exchequer Chamber did not come into the
 place of parliamentary correction of erroneous judgments;
 but it is now clearly agreed and settled to be, if resorted to,
 an immediate tribunal. The court of Exchequer Chamber,
 constituted by the stat. 31 Ed. 3. c. 12. has been deter-

If action in
 Exchequer.

mined to be a necessary stage between the law side of the Exchequer and the House of Lords. We may remember that there is a third court of Exchequer Chamber (see *ante*, Sec. iv. n. p. 518.) subsisting by the common law, holden before all the judges of England, into which causes may be adjourned before judgment on account of their great weight and difficulty, and from which also a writ of error is returnable in parliament.

Of the common law court of Exchequer Chamber.

In the 14th year of queen Elizabeth a writ of error, from the law side of the Chancery, was brought in the King's Bench, where the prior judgment was reversed. This case however, and other authorities being cited before Lord-keeper North, he declared that the judgments, even on the law side of his court were not liable to be reviewed in the King's Bench, and that he would grant injunctions against all such writs of error. Sir William Blackstone differs from this judicial opinion, which seems to him not well considered. I shall not presume to arbitrate in this controversy, observing only that there are several respectable authorities in confirmation of the lord-keeper's doctrine as well as those alleged by the learned commentator in opposition to it. *Woodeson Est. 223.*

Of error from the law side of Chancery.

Lastly, as to the Common Pleas, it has been settled, at least ever since the reign of Edward the Third, that judgments there given, cannot be examined *per saltum* in the Lords' House, but must pass the King's Bench, and be there previously reversed or affirmed. *Woodeson's Est. 224.*

Of judgments in C. B.

The writ of error is obtained of the curfitor as in other cases, who procures the king's *fiat* or warrant, but a proper *præcipe* must be made. The clerk of errors will allow it, plaintiff in error must serve copy of allowance on defendant's attorney.

This writ how obtained.

Allowance.

Bail if required is put in before a judge; clerk of errors will attend for that purpose. Notice of bail (same as in common cases, only saying that they are put in on the writ of error) must be given to defendant, who, if he pleases, may have a rule for better bail, and they must justify as in other cases, clerk of errors attending the court with his book for that purpose. Rule for allowance of bail must be got and served.

Bail.

When this writ is brought it is made returnable immediately, except on a *prorogation*; then *ad proximum parliamentum*; because, during the session, they sit continually and have no vacation.

Return of writ.

When bail is perfected, get a rule to transcribe at clerk of errors; serve copy on plaintiff's attorney, who must leave copy of proceedings for clerk of errors to make transcript, and

Rule to transcribe.

nomination of 10
How transcript
delivered.

No *seire facias*
quere but sub-
sequent pro-
ceedings by mo-
tion.

Who conducts
proceeding after
transcript.

Of assigning
errors.

Alleging dimi-
nution.

Joinder in error.

Printing cases,
&c.

Arguing, &c.

Remittitur.

Day for hearing
how to be al-
tered.

and pay transcript-money as in other cases of error, other-
wise *non prof.* will be signed; see *ante*, Sect. v.
It is an eight-day rule from the service.

The transcript when complete and examined is delivered
by the clerk of errors to the chief justice of the King's
Bench, who carries the record and transcript to the House
of Lords; and after they are examined there, leaves the
transcript and brings back the record.

There is no *seire facias quere*, &c. on this writ (so that the
proceedings are more expeditious); but on motion made in
the house by a peer on behalf of the defendant, a day is ap-
pointed for plaintiff in error to assign errors. He is only
allowed eight days for that purpose; if not done within
time, a *non prof.* & *remittitur* issues from the clerk of the
parliaments.

For as soon as the transcript is carried to the House of
Lords, a clerk in parliament is employed to conduct the
subsequent proceedings; and the days are appointed for
plaintiff to assign errors, for defendant to appear and make
his defence upon the assignment of errors by plaintiff, and
for the hearing of the errors, upon motions made in the
House by Peers. In which last case, sometimes a short day
will be appointed if the sessions are nearly at an end, or the
like.

If plaintiff in error alleges diminution, and prays a *cer-
riorari*, same to go without motion, and to be returned in
ten days; if not so returned, nor good cause shewn for the
neglect, the benefit of the writ will be lost.

Upon the assignment of errors, the defendant joins issue
in nullo est erratum, a peer moves the house to appoint a day
for hearing the errors; at which day both parties attend by
counsel, usually two on a side, but they must not have
more.

If printed cases are delivered, 500 on each side is the usual
number, as 250 are to be left at the Parliament office for the
lords and judges; they must be signed by counsel. On the
hearing, the lords either affirm or reverse the judgment on
which the clerk of the parliaments draws a *remittitur*, by
which the transcript of the record is remanded into the
King's Bench, with the affirmance or reversal to be entered
of record.

When a day is appointed for the hearing, it cannot be
altered except by petition, of which two days notice must
be given to the adverse party.

How counsel to proceed to open and argue the errors, see
the order *infra* of 2 Mart. 1727.

For the regulation of the proceedings on error in parliament, as above mentioned, the following orders have been made by the lords :

By *Ordo Dom. Procer. die Ven. 13 Dec. 1661.*

Forasmuch as upon writs of error returnable in this high court of Parliament, the parties therein often desire to delay justice, rather than to come to the determination of the right of the cause ; " It is therefore ordered, by the lords spiritual and temporal, in parliament assembled, that the plaintiffs, " in all such writs, after the same and the records be brought " in, shall speedily repair to the clerk of the parliament, and " prosecute the writs of error, and satisfy the officers of " this house their fees justly due unto them, by reason of " their prosecution of the said writs of error, and the proceedings thereupon ; and further, shall assign their errors " *within eight days after the bringing in of such writs with the " records ;* and if the plaintiff makes default so to do, then " the said clerk, if the defendant in such writs require it, " shall record, that the plaintiff hath not prosecuted his writ " of error ; and that the house do therefore award that such " plaintiff shall lose his writ, and that the defendant shall go " without day, and that the record be remitted ; and if any " plaintiff, in any writ of error, shall allege diminution, and " pray a *certiorari*, the clerk shall enter an award thereof " accordingly, and the plaintiff may, before *in nullo est erratum* pleaded, sue forth the writ of *certiorari* in ordinary " course, without special petition or motion to this house " for the same ; and if he shall not prosecute such writ, and " procure it to be returned *within ten days after his plea of " diminution put into this house*, then, unless he shall shew " some good cause to this house for the enlarging of the " time for the return of such writ, he shall lose the benefit " of the same, and the defendant in the writ of error may " proceed as if no such writ of *certiorari* were awarded."

And by *Ordo Dom. Procer. die Martis, 19 Aprilis 1698.*

The house taking notice, that upon appeals and writs of error, there have been of late several scandalous and frivolous printed cases delivered to the lords of this house ; for preventing whereof for the future, it is this day ordered, by the lords spiritual and temporal, in parliament assembled, that no person whatsoever do presume to deliver any printed case or cases to any lord of this house, unless such case or cases shall be signed by one or more of the counsel who attended at the hearing of the cause in the courts below, or shall be of counsel at the hearing in this house : and this order to be added to the roll

Orders of House of Lords.

As to prosecuting writ, paying fees, assigning errors ;

alleging diminution, &c.

Of printed cases signed by counsel.

nomination till 10
How transcript
delivered.

No *scire facias*
grants but sub-
sequent pro-
ceedings by mo-
tion.

Who conducts
proceeding after
transcript.

Of assigning
errors.

Alleging dimi-
nution.

Joinder in error.

Printing cases,
&c.

Arguing, &c.

Remittitur.

Day for hearing
how to be al-
tered.

and pay transcript-money as in other cases of error, other-
wise *non prof.* will be signed; see *ante*, Sect. v.

It is an eight-day rule from the service. The transcript when complete and examined is delivered by the clerk of errors to the chief justice of the King's Bench, who carries the record and transcript to the House of Lords; and after they are examined there, leaves the transcript and brings back the record.

There is no *scire facias quare*, &c. on this writ (so that the proceedings are more expeditious); but on motion made in the house by a peer on behalf of the defendant, a day is appointed for plaintiff in error to assign errors. He is only allowed eight days for that purpose; if not done within time, a *non prof.* & *remittitur* issues from the clerk of the parliaments.

For as soon as the transcript is carried to the House of Lords, a clerk in parliament is employed to conduct the subsequent proceedings; and the days are appointed for plaintiff to assign errors, for defendant to appear and make his defence upon the assignment of errors by plaintiff, and for the hearing of the errors, upon motions made in the House by Peers. In which last case, sometimes a short day will be appointed if the sessions are nearly at an end, or the like.

If plaintiff in error alleges diminution, and prays a *certiorari*, same to go without motion, and to be returned in ten days; if not so returned, nor good cause shewn for the neglect, the benefit of the writ will be lost.

Upon the assignment of errors, the defendant joins issue *in nullo est erratum*, a peer moves the house to appoint a day for hearing the errors; at which day both parties attend by counsel, usually two on a side, but they must not have more.

If printed cases are delivered, 500 on each side is the usual number, as 250 are to be left at the Parliament office for the lords and judges; they must be signed by counsel. On the hearing, the lords either affirm or reverse the judgment on which the clerk of the parliaments draws a *remittitur*, by which the transcript of the record is remanded into the King's Bench, with the affirmance or reversal to be entered of record.

When a day is appointed for the hearing, it cannot be altered except by petition, of which two days notice must be given to the adverse party.

How counsel to proceed to open and argue the errors, see the order *infra* of 2 Mart. 1727.

For

For the regulation of the proceedings on error in parliament, as above mentioned, the following orders have been made by the lords :

By *Ordo Dom. Procer. die Ven. 13 Dec. 1661.*

Forasmuch as upon writs of error returnable in this high court of Parliament, the parties therein often desire to delay justice, rather than to come to the determination of the right of the cause ; “ It is therefore ordered, by the lords spiritual and temporal, in parliament assembled, that the plaintiffs, in all such writs, after the same and the records be brought in, shall speedily repair to the clerk of the parliament, and prosecute the writs of error, and satisfy the officers of this house their fees justly due unto them, by reason of their prosecution of the said writs of error, and the proceedings thereupon ; and further, shall assign their errors *within eight days after the bringing in of such writs with the records* ; and if the plaintiff makes default so to do, then the said clerk, if the defendant in such writs require it, shall record, that the plaintiff hath not prosecuted his writ of error ; and that the house do therefore award that such plaintiff shall lose his writ, and that the defendant shall go without day, and that the record be remitted ; and if any plaintiff, in any writ of error, shall allege diminution, and pray a *certiorari*, the clerk shall enter an award thereof accordingly, and the plaintiff may, before *in nullo est erratum* pleaded, sue forth the writ of *certiorari* in ordinary course, without special petition or motion to this house for the same ; and if he shall not prosecute such writ, and procure it to be returned *within ten days after his plea of diminution put into this house*, then, unless he shall shew some good cause to this house for the enlarging of the time for the return of such writ, he shall lose the benefit of the same, and the defendant in the writ of error may proceed as if no such writ of *certiorari* were awarded.”

Orders of House of Lords.

As to prosecuting writ, paying fees, assigning errors ;

alleging diminution, &c.

And by *Ordo Dom. Procer. die Martis, 19 Aprilis 1698.*

The house taking notice, that upon appeals and writs of error, there have been of late several scandalous and frivolous printed cases delivered to the lords of this house ; for preventing whereof for the future, it is this day ordered, by the lords spiritual and temporal, in parliament assembled, that no person whatsoever do presume to deliver any printed case or cases to any lord of this house, unless such case or cases shall be signed by one or more of the counsel who attended at the hearing of the cause in the courts below, or shall be of counsel at the hearing in this house : and this order to be added to the

Of printed cases signed by counsel.

roll

roll of standing orders, and affixed on the doors of this house, and the courts in Westminster.

And by *Ordo Dom. Procer. die Mercur. 22 Dec. 1703.*

Of altering day
fixed for hear-
ing errors.

Upon consideration of the great inconveniencies arising by motions and petitions for putting off causes after days have been appointed for hearing thereof; it is ordered, by the lords spiritual and temporal, in parliament assembled, that when a day shall be appointed for the hearing any cause, appeal, or writ of error, argued in this house, the same shall not be altered, but upon petition; and that no petition shall in such case be received, unless *two days notice thereof be given to the adverse party*, of which notice oath shall be made at the bar of this house: And it is further ordered, that this order be added to the roll of standing orders.

And by *Ordo Dom. Procer. die Veneris, 21 Feb. 1717.*

Of the certifi-
cate that dimi-
nution is al-
leged.

Ordered, that in all cases upon writs of error depending in this house, when diminution shall be at any time alleged, and a *certiorari* prayed and awarded before *in nullo est erratum* pleaded, the clerk of the parliaments shall, upon request to him made, give a *certificate that diminution is so alleged*, and a *certiorari* prayed and awarded thereupon: And it is further ordered, that this order be entered on the roll of the standing orders of this house.

And by *Ordo Dom. Procer. die Sabbatis, 2 Mart. 1727.*

How counsel to
be heard on the
errors;

Upon report from the committee of the whole house, appointed to take into consideration matters relating to the proceedings on appeals, and writs of error; it is ordered, by the lords spiritual and temporal, in parliament assembled, that at the hearing of causes for the future, one of the counsel for the appellants shall open the cause, then the evidence on their side shall be read; which done, the other counsel for the appellants may make observations on the evidence; then one of the counsel for the respondents shall be heard, and the evidence on their side to be read, after which the other counsel for the respondents shall be heard, and one counsel only for the appellants to reply.

what abates the
writ.

If the parliament is dissolved, the writ of error is abated, but not if it be prorogued. Ray. 383. 2 Leo. 93.

How if pending
writ action
brought against
bail.

If pending the writ of error, an action is brought against the bail below upon their recognizance, and a writ served upon them, it is a contempt and breach of privilege. P. Wms. 685.

If,

If, on a judgment in C. B. a writ of error be brought in K. B., and bail put in thereon, and judgment affirmed, and afterwards a writ of error brought in parliament, a new recognizance must be given; for the first does not include costs to be assessed in the House of Lords. *Str. 527. Colebrooke v. Diggs, Sal. 97.*

The court of K. B. will oblige defendant to enter into a rule not to commit waste pending the writ of error, if the justice of the case requires it. *Wharod v. Smart, Burr. 1823.*

As to the judgment itself, it may often happen, that a simple judgment of affirmance or reversal will not avail, but that the same sentence ought to be given, which should have been pronounced by the inferior court. Thus, in the action of ejectment, the prescribed judgment, if for the plaintiff, is that he recover his term in the estate in question; if for the defendant, it is formally entered, that the plaintiff take nothing by his writ. If then, in this action, a prior judgment is given for the defendant, which is deemed erroneous by the lords, it is not sufficient, it is not going far enough, merely to reverse it; but there ought to be added, that the plaintiff recover his term, being the judgment which ought originally to have been given. If the lords neglect to make this order, it cannot be supplied in the court below; but the futor must again resort to their bar to rectify the omission which has been done by motion in parliament before the remitting of his transcript of the record back into the King's Bench was entered in that court. *1 Woodeson Est. 227.*

If the prior judgment, deemed erroneous, be given for the plaintiff, it is sufficient simply to reverse it. (*Pugh and another v. Goodtitle, House of Lords, May 1787.*)

So, if judgment be given in the Exchequer for plaintiff reversed in the Exchequer Chamber, and that reversal approved by the lords, it is sufficient that such second judgment be affirmed. (*Sutton v. Johnson, House of Lords, May 1787.*)

Or, if judgment below be given for plaintiff and deemed right, it need only be affirmed. (*East India Company v. Todd, House of Lords, May 1798.*)

So, if two former judgments concur, and are deemed right, they need only be affirmed, but probably discretionary costs would be awarded. (*Foley v. Burnell, House of Lords, April 1789. 1 Woodeson, 228. n.*)

In a writ of error from K. B. to the House of Lords, only a transcript of the record is sent up, which must after judgment be remitted, and the King's Bench awards execution. *Vicars v. Haydon, Cow. 843.*

When new recognizance must be given

Of the judgment;

when to be reversed;

when another judgment to be pronounced;

when only to be affirmed.

Of the remittitur into B. R.

If

How if writ of inquiry necessary.

If judgment below was given for the defendant, upon demurrer, and the judgment be reversed, whereupon a writ of inquiry becomes necessary in such case, as the lords cannot award a writ of inquiry, the record is remitted to B. R. for them to award the writ of inquiry, and upon return thereof, then to give final judgment. *Vicars v. Haydon*, Cow. 843.

How if remitted without proper judgment given.

Error of a judgment in B. R. for defendant, into *Dom. Proc.* and the judgment was reversed, and the record was remitted into B. R.; whereupon the plaintiff moved B. R. for a new judgment. *Per cur.*—A new judgment cannot be given here contrary to that which is already given; the same court which reversed must give a new judgment. *Philips and Bury*, Carth. 319. *Ld. Raym.* 9, 10.

The House of Lords give costs at their discretion, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment of the court below. *Burr.* 1097.

Of the costs in parliament.

SECTION VI.

Of proceeding in Error coram nobis, &c.

Error coram nobis is where writ of error lies in the same court where record is.

There are some cases in which a writ of error lies in the same court where the record is. Thus, if upon a judgment in B. R. there be error in the process, or through the default of the clerks, it shall be reversed in the same court by writ of error sued there before the same justices, but not if the error is in the judgment.

Why this writ lies.

All errors in fact on any judgment in B. R. are redressed there, and not in Parliament, nor in the Exchequer Chamber, for the statute 27 Eliz. does not extend to them; and the reason is, because error in fact is not the error of the judges; therefore the reversing such judgment is not reversing their own judgment.

Instances thereof.

Thus if an infant appear by attorney, and judgment be against him, this writ may be brought to reverse it; but then a guardian should be appointed to prosecute it as in other cases of infancy; and this is called a writ of error *coram nobis residens*, &c. because it recites that the record is remaining before us.

Criminal cases.

Upon all judgments in criminal cases in B. R., error will lie in the same court, whether the error be in fact or in law; but it lies also in Parliament. 3 Sal. 147.

Where it does or does not lie.

If a writ of error once good, abates by plea or death, the inferior court cannot proceed; but the superior court and party may have a new writ *quod coram vobis residet*, but where

where the writ is ill, no new writ *coram vobis* can be had; as where the writ was to remove a judgment *quod fuit in curia nostra* where it was in the time of a predecessor. Latch. 198.

Error *coram vobis* lies not after an affirmance of a judgment, except in case of error upon a *fine* in C. B., after affirmance thereof in B. R. Salk. 337. Although in this case of a *fine*, the transcript is only transmitted into B. R. upon error brought.

Error *coram vobis* does not lie in B. R. after error brought in *Cam. Scacc.* and judgment affirmed. Because, before the statute of Eliz. B. R. could not examine its own errors in fact, after an affirmance in parliament; and the Exchequer Chamber is now in the same degree with regard to B. R. in those cases within the statute, as the parliament was before, and is now. Stra. 690.

Error *coram vobis* lies not in the Exchequer Chamber. Cro. Jac. 620.

In F. N. B. 21. it is said, that a judgment cannot the same term it is given be reversed in B. R. without a writ of error, though a judgment in the Common Pleas may: but there seems no foundation for this distinction. Moor, 186. pl. 332. Yelv. 157. Pop. 181. For during the whole term in which any judicial act is done, the record remains in the breast of the judges of the court; and therefore the roll is alterable during the term, as they shall direct. But when the term is past, the roll is the record, and admits of no alteration. Co. Lit. 260. a.

When a record is removed upon error brought from C. B. or other inferior court, into B. R., and the same writ of error is quashed for any other fault than *variance*, error *coram vobis* lies in the same court to which the record is removed; Co. Ent. 289. 1 Stra. 607.; and in such case such writ of error is the only writ that can be had. *Ibid.* Ld. Raym. 1403.

When errors are assigned, and afterwards that writ of error is discontinued, the plaintiff in error may have another writ *quod coram vobis residend.*, and upon this new writ may assign other errors than those he assigned before, either within or without the record, and is not bound to the same errors.

This writ of error *coram vobis* recites the former writ of error, and must recite it accurately; for where such writ recited the former writ to be returnable *coram nobis*, where it was before the king, and the late queen, it was quashed. Ld. Raym. 151. Carth. 370.

It is generally laid down in the books of practice, that this writ does not operate as a *superfedeas*, and that no bail is

How it operates as *superfedeas*.

How to sue it
out,
and proceed on
it.

ever required thereon; but in Mr. Impey's Practice, K. B. 1793, which I take to be correct, the contrary is holden; and the mode of proceeding is, to make *præcipe* for curfitor in the county where *venue* is laid, when the writ is obtained to get it allowed by the master, and to serve the allowance on the opposite attorney, which shall operate as a *superfedeas*, upon the plaintiff in error putting in and justifying bail within four days after such allowance.

Allowance.
Bail.

The rule for allowance is drawn up to the above effect. When the writ is allowed, and notice thereof given, and bail perfected, get a rule of the master for plaintiff to assign errors; it is a four-day rule from the service. If errors not assigned within the time, a *non pros* may be signed.

Assignment of
errors.

Upon the assignment of error *in fact*, if the error *in fact* is assignable and well assigned, the defendant may confess it. Salk. 268. But a defendant can never confess error in law.

But if the error in fact is not truly assigned, the defendant may plead thereto, upon which the parties are at issue in *fact*; and that must be tried by a jury. The record for trial is then made up the same as in other cases, and either party may carry it down; and in such case, if the issue is found for the plaintiff in error, he must move to put the cause in the paper for argument, and then upon producing the *posse* the court will give judgment of reversal.

Operation of
plea in nullo est
erratum.

Or if the error in *fact* assigned is not assignable for error, then the defendant may join in *nullo est erratum*, which is in nature of a *demurrer*, and the same is argued in court as in other cases.

Where matter of fact is insufficiently alleged, *in nullo est erratum* is a demurrer. So it is if matter of fact is alleged against the record. But if matter of fact is well set forth with matter of law, it is a *demurrer* as to the doubleness, but that must be specially assigned; or otherwise, upon *in nullo est erratum* pleaded, the matter of fact will be confessed, and the matter of law referred to the judgment of the court.

How if defend-
ant does not
join in error.

Error *coram vobis*, and infancy assigned, a *scire facias ad audiendum errores*, and *scire feci* returned; but defendant did not appear and join in error; on which plaintiff applied to know what to do. The court directed him to put it in the paper, without taking out any rule to join in error; and when it came on, the judgment was reversed. *Thatcher v. Stephenson*, Stra. 144.

Error in C. B. infancy assigned. Doubt del court, and feigned issue, which was found for plaintiff in error, and the judgment was reversed on return of the *posse*, upon motion, without

Sec. VI.] OF PROCEEDING IN ERROR, &c.

without argument in the paper, but within a day or two after. *Osborn v. Barrington*, Stra. 127.

SECTION VII.

Of proceeding in Error tam quam.

A writ of error *tam in redditione judicii quam in adjudicatione executionis*, is a writ of error brought by bail (after *scire facias* against them, and award of execution thereon) of the judgment against them, and the execution awarded thereupon; for they cannot have error of the principal judgment. Cro. Car. 481. 2 Leon. 101. Cro. Car. 561.

Writ of error tam quam, what.

Nor can the bail join with the principal in error. Palm. 567.

This writ of error recites the judgment against the principal, but alleges the error in the second judgment, and in the execution thereof to the damage of the bail.

When it lies

For error in *fact* the bail are relievable by *audita querela*. Yelv. 155. And now by motion.

Bail brought a writ of error *tam in redditione judicii* in the original action, *quam in adjudicatione executionis*. And it was quashed, because bail cannot have error on the principal judgment. Carth. 447.

After an award of execution against bail, on a recognizance in error, they brought a writ of error, as to such award of execution: the plaintiff moved for leave to take out execution for want of bail on the writ of error brought by the bail, and obtained a rule to shew cause; which was afterwards discharged, no bail in this case being required. Barnes, 194.

This writ lies on a judgment for plaintiff in B. R. afterwards affirmed in the Exchequer Chamber, and an award of execution in B. R. on a *scire facias* brought by plaintiff against defendant's bail.

The defendant cannot have this writ returnable in the Exchequer Chamber. Sal. 263.

How returnable.

This writ is taken out, allowed and proceeded on as on the writ of error *ceram nobis*.

How proceeded on.

OF PROCEEDING IN ERROR, &c. [CH. XVIII.]

SECTION VIII.

Of proceeding in Error by Plaintiff to reverse his own Judgment.

If a plaintiff having obtained judgment below, brings a writ of error to reverse his own judgment, (which is nothing strange or unreasonable where it is given for a less sum than he has a right to demand,) the common method of bringing a *scire facias quare executionem non* would be improper, so would his suing out a *scire facias ad audiendum errores*. Therefore if such plaintiff in error will not proceed after his writ of error brought, the court of B. R. may and ought to make a rule to oblige him to assign errors within a limited time; which rule the court will make upon the plaintiff in error, to assign errors within *four days*, or else that his writ of error shall be *nonprossed*. *Johnson v. Jebb*, Burr. Rep. 4 p. 1772.

SECTION IX.

- (A) Of Summons and Severance in Error.
- (B) Of quashing Writs of Error.
- (C) Of Abatement of Writ of Error.
- (D) Of amending Judgments after Error brought.
- (E) Of amending Writs of Error.

(A) (A) Of Summons and Severance in Error.

Who must join in error.

It is a certain rule, that all the parties to the suit below must in all cases of error be made parties also in the writ of error; and in case of the death of a party, he must be named, and his death alleged in the writ. *Brewer v. Turner*, Str. 233. *Cooper v. Ginger*, Str. 606.

If therefore there is a joint judgment against two, and the writ is laid *ad damnum* of one of them only, it will be quashed on motion.

How if some refuse.

If one therefore brings error, he must do it in the name of all; and if afterwards any of the others refuse to appear upon the *scire facias quare*, &c. or to assign errors upon the rule given for that purpose, summons and severance lies, and the court will grant the other plaintiff in error time to

Of summons and severance.

such

such summons and severance can be effected. Mod. C. 40. Yelv. 4.

After a *scire facias* taken out and *scire feci* returned, one of the plaintiffs in error moved for time to assign errors till there could be a summons and severance of the other, upon an affidavit that the other executor was in the interest of the defendant in error, and would not join; and time was given accordingly. *Frescobaldi v. Kingston*, Str. 783.

Time allowed for that purpose.

Three join in bringing a writ of error, the defendant pleads outlawry in abatement as to one of them; but the court held this no good plea, because they are all compellable to join. Palm. 151.

But although there is this strictness in all the parties who should be plaintiffs in error joining, yet it does not seem to hold with respect to the defendants in error; for where one defendant in error only appeared, and sued out the *scire facias* *quare*, and plaintiff assigned errors, it was deemed a waiver of the objection that the other should have joined; and it was said, that the reason why plaintiffs should join, did not apply to defendants, viz. the inconvenience that would arise by a perpetual delay of execution, if every defendant might bring a writ of error by himself. *Know v. Costello*, Burr. 1989.

Whether defendants in error must afterwards all join in proceeding.

A writ of error was quashed, because all the proper parties were not plaintiffs. Ld. Raym. 71.

Consequence of parties not joining.

But if the defendant in error proceeds without quashing the writ, and judgment is affirmed, he can only sue out execution against the one who was party to the writ; nor can he do that, if the error be in Exchequer Chamber till the *remittitur* is sent into B. R. 2 D. & E. 737. *Laroche v. Waf-brough and another*.

(B) Of quashing Writs of Error,

(B)

If one brings error without the other, who ought to join with him, though the writ shall be quashed, yet the record shall be removed by it. Ld. Raym. 1403. Such writ cannot be amended; Ld. Raym. 1532.; and in this case said, that the record is not removed by such bad writ of error.

Of quashing writs of error;

Several judgments were against three executors, two of whom only joined in bringing error, and bad. 1 Will. 88.

for what;

No person can bring error to reverse a judgment, who was not a party or privy to the record, or who was not injured by the judgment, and therefore to receive advantage by the reversal. Roll. Abr. 747. Dy. 90.

So error does not lie against any but him who was party or privy to the first judgment, his heirs, executors, or administrators. Roll. Abr. 747. 9 Hen. 6. 46, &c.

quashed as to part.

A writ of error *tam quam* may be quashed as to one judgment, and stand good as to another, if it should be brought for error in the principal judgment, as well as for error in *adjudicatione executionis*, which is wrong. Ld. Raym. 328.

A writ of error of a judgment on a recognizance was quashed, because it was in *adjudicatione executionis judicii*. Ld. Raym. 553.; for it ought to have been in *adjudicatione executionis super recognitionem*.

For variance.

So quashed for variance in the style of the court. Ld. Raym. 704.

At what time to be quashed.

A writ of error cannot be quashed till the transcript is returned and filed. Ld. Raym. 329.

In what court.

A writ of error on a judgment in B. R. returnable in the Exchequer Chamber, cannot be quashed in B. R. Dougl. 336. but only by that court into which it is returnable.

Not because brought too late.

The court will not quash a writ of error on motion, though it appears to be brought *twenty-nine years* after the judgment, and the statute restrains the party to *twenty years*; because if they did, it would deprive the plaintiff in error of the benefit of replying to the exceptions in the statute. *Higgs v. Evans*, Str. 837.

Costs in such case.

Costs upon quashing writs of error are to be given in all cases. Str. 606.

(C)

(C) Abatement of Writ of Error.

Of defendants quashing their own *scire facias*, writ having abated by marriage.

Error of a judgment in C. B. in an action there by a *feme sole*. To the *scire facias quare executionem non*, the plaintiff in error pleaded in abatement, that the defendant in error was married since the judgment, and before the issuing of the *scire facias*; on which defendants in error moved to quash their own *scire facias*, and the other side insisted upon costs. *Per cur.*—It is the same in a *scire facias* as in an action, where you plead in abatement, and plaintiff's writ is abated, he pays no costs. Had there been no plea in abatement, and the party had moved to quash his own writ, we should have made him pay costs. The writ was quashed without costs. *Pocklington v. Peck*, Str. 638.

Of abatement of writ.

By death of plaintiff.

If the plaintiff in error dies before errors assigned, the writ abates, and the defendant in error may sue out a *scire facias* to revive the judgment against his executor, &c. But if he die after errors assigned, and a joinder in error, it does not abate the writ, and the defendant in error may proceed to get the judgment affirmed, but must then revive it against the executor, &c. of the plaintiff in error.

After the record removed from C. B. into B. R. by writ of error, defendant died, and the plaintiff moved in C. B. for leave

leave to take out a *scire facias* against defendant's executors. But on shewing cause, the rule was discharged. The record being removed out of C. B., the motion was improper in that court. Barnes, 206.

A writ of error does not abate by the death of the defendant in error. Ld. Raym. 439. Salk. 246. But otherwise if the plaintiff die. Sir *H. Thynne v. Corie*, 1 Vent. 34. A *scire facias ad aud. errores* went against the executor, when the defendant in error died. Barnes, 432.

By death of defendant not.

If there are several plaintiffs in one writ of error, the death of one abates the writ of error, because there cannot be any judgment according to the writ; but if there are several defendants in error, and one dies, it is otherwise, for they are not named in the writ. Ld. Raym. 244.

By death of some of the parties.

So a writ of error does not abate by the death of the defendant in error after *in nullo est erratum* pleaded. Ld. Raym. 1295.

When death must happen.

If a writ of error abates by the act of the party, execution shall go. Str. 1025. As where a writ of error brought by a *feme sole* abated by her marriage; and then she and her husband brought a second writ; the court gave leave to take out execution, it being a delay by the act of the plaintiff in error.

Consequence of writ abating.

Entry of *disseisee*, pending a writ of error, abates it. Ld. Raym. 476. An abateable writ is abated as to a stranger. *Ibid.*

Where a writ of error abates by motion, the court must be moved to take out execution; but otherwise if for *variance*. Salk. 264. But now if the writ varies from the record, &c. it is amendable by 5 Geo. 1. c. 13.

If a writ of error abates or discontinues by the act and default of the party, a second writ shall be no *superfedeas*. Keb. 658. As if plaintiff in error be nonsuit, he shall not have a writ of error again. Salk. 263. pl. 4. Ld. Raym. 91.

Of second writ in such case.

But if a writ of error abates by the act of God, or the law, a second writ of error will be a *superfedeas*. As where a writ of error abated by the death of the lord chief justice Foster, and a second writ of error was sued out and allowed, and it was held a *superfedeas*. Keb. 658. So a second writ is a *superfedeas* upon abatement of the first writ of error by death.

How a *superfedeas*.

(D) (D) Of amending the Judgment after Error brought.

Postea.

The *postea* may be amended by the judge's notes at any time, even after final judgment, and writ of error brought. *Doe dem. Church v. Perkins*, 3 D. & E. 749.

Verdict as to entering a remittitur.

Where a verdict is given for a greater sum than the amount of the damages laid in the declaration, and for that cause a writ of error is brought, the court will permit the plaintiff to enter a *remittitur* of the excess above the sum laid in the declaration, on payment of the costs of the writ of error. *Pickwood v. Wright*, 1 C.B. T. R. 643.

Verdict by judges' notes.

Defendant pleaded the general issue, and the statute of limitations, a verdict was found for the plaintiff on the first issue, and no notice taken of the last; after error brought and joinder in error (which was assigned on this point) the court allowed it to be amended by the judges' notes, on payment of costs. *Petrie v. Hannay*, 3 D. & E. 659.

Judgment in replevin.

Where the defendant in replevin made cognizance for rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in his cognizance, *without finding either the amount of the arrear, or the value of the cattle distrained*, and judgment was entered for the damages assessed, the court permitted the defendant to amend his judgment, and to enter a judgment *pro retorno habendo* after a writ of error brought. *Rees v. Morgan*, 3 D. & E. 349.

A mistake in form on which error is assigned.

If error is assigned on a mistake in form, the mistake may be amended in the court below, pending the writ of error. *Richards v. Brown*, Doug. 116.

And this in a penal action. *Ibid.*

Judgment against executor.

A judgment may be amended by changing it from "*de bonis propriis*" to "*de bonis testatoris fi.*" &c. after error brought. *Richards v. Brown*, Doug. 116. *Short v. Coffin*, Burr. 2730.

Judgment in debt.

So, if the judgment do not say that the damages *occasione detentionis debiti* were awarded *ex assensu suo*, it may be amended though that has been assigned for error. *Ibid.*

Name of attorney in warrant.

The name of the attorney in the plaintiff's warrant may be altered so as to make it correspond with that in his declaration, after error brought, and the variance between the warrant and declaration assigned for error. *Richards v. Brown*, Doug. 116.

Addition in warrant.

So a mistake in the addition in the warrant of attorney may be amended after error brought. *Ibid.*

Surname of attorney in declaration.

So the surname of the attorney in the declaration may be amended, and made to correspond with that in the warrant after error brought. *Ibid.*

The

The court gave leave after error brought to amend the record by inserting a special memorandum of the day when defendant's bill was filed. *Dickinson v. Plaisted*, 7 D. & E. 474.

So the judgment may be amended by the paper-book, signed by the master. *Parsons v. Sill*, Salk. 51.

Amendments of the judgments have been made after writ of error; and a record transcribed; but transcript not carried into K. B. Bar. 18.

And after *nullo est erratum* pleaded. Bar. 7. *Foster v. Blackwell*.

And even after argument on error, court of K. B. postponed judgment, though they thought the judgment below not to be supported upon the importunity of defendant in error, to move the court of C. B. to amend the record by verdict, which was afterwards done. *Smith v. Fuller*, Str. 786.

These amendments are generally allowed upon payment of costs, provided plaintiff does not further prosecute his writ of error; but if he proceeds, then without costs. Bar. 17.

Judgment amended by paper-book. Amendments after transcript;

after pleading in error;

after argument and time allowed for that purpose.

Costs in such case.

(E) Of amending Writs of Error.

(E)

A writ of error was not amendable at common law, nor by any of the statutes of amendments and jeofails, till the 5 Geo. 1. c. 13.; for all amendments are granted for the support of judgments; but the principal design of writs of error is to reverse them. Ld. Raym. 71.

But by the stat. 5 Geo. 1. c. 13. it is enacted, "That all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended, and made agreeable to such record, by the respective courts where such writ or writs of error shall be made returnable," &c.

Stat. 5 Geo. 1. c. 13.

A writ of error was returnable before any judgment given, and on consideration it was held to be such a fault as is not amendable by the 5 Geo. 1. Str. 807.

What amendments allowed.

There was a variance between the writ of error and the record; and as it stood in the paper the court observed it; but neither party would move to amend it, for fear of paying costs. Upon which the court said, the stat. 5 Geo. 1. c. 13. would warrant their amending it, which they did without costs. *Gardner v. Merratt*, Str. 902. Ld. Raym. 1587.

How as to costs.

Error was brought by B. to reverse a judgment given against him in C. P. after verdict in ejectment, wherein he was defendant. The writ was *tested 23d of Oct.* and returnable

able

able *in eight days of St. Martin, in Mich.* following. And by the record certified, the judgment appeared not to be given till Hilary following. Whereupon it was clearly held, that the record was not removed by this writ of error. Then it was moved, that the writ of error might be amended by the 5 Geo. 1. c. 13.; but upon reading the statute, the court were of opinion it could not be done; for it would be to amend the writ, contrary to the truth of the case, as the judgment, in fact, was not given till Hilary term; and therefore, this was not such a *variance* as was intended to be amended by that act. *Ld. Raym. 1531. Str. 807.*

In what court to be amended.

After error in *Cam. Scacc.* from B. R., the transcript was brought back and amended in B. R. by the original record there; and it was held necessary to make the amendment in B. R., because this differs from the case of a writ of error from C. B. into B. R., for C. B. sends up the very record, whereas B. R. only sends the transcript. *Rutter v. Redstone, Str. 837.*

Of amending writ of execution upon error.

Judgment was against two, one only brought error; the writ was never moved to be quashed, but defendant in error went on, and judgment was affirmed in *Cam. Scacc.*, and costs given, and *both* defendants were taken under a writ of execution on the whole sum, including the costs of the writ of error as well as the original sum recovered; the court of K. B. permitted the plaintiff to amend his writ of execution as to the defendant who did not join, by altering it to the original sum recovered. *Laroche v. Walsbrough and another, 2 D. & E. 737.*

New bail on amended writ.

If a writ of error is amended in B. R., new bail shall be given to the amended writ in C. B., and the plaintiff below shall not take out execution for want of bail. *2 Black. Rep. 1067.*

Costs.

No costs are to be paid on any amendment of writs of error, pursuant to this statute; but if the writ of error be quashed, the defendant in error shall have *costs*. *Fitzgib. 201.*

SECTION X.

Of False Judgment.

What it is.

A writ of *false judgment* lies where an erroneous judgment is given in any court not of record, in which the suitors are judges. *F. N. B. 18. a.*

Where it lies.

If there are no *suitors* by whom the plaint may be certified, there shall not be *false judgment*, as in a copyhold court; in

in which, upon an erroneous proceeding, the copyholder must sue to the lord by petition. F. N. B. 18. h.

A writ of false judgment upon a judgment in the sheriff's court, is in the nature of a *recordari*. F. N. B. 18. a. b.

And upon a judgment in another court, not of record, it is in the nature of an *accedas ad curiam*. *Ibid*.

A writ of false judgment may be sued by any one against whom judgment is given, his heir, executor, or administrator. By whom to be sued,

Or by any one who has damages, though the other defendants do not join as they ought to do in error. R. Mod. 854.

A writ of *false judgment* issues as a *writ of error* out of Chancery, upon application to the proper *curfitor*.

Upon the return of the writ, and the whole record certified, and not before, the plaintiff shall assign his errors. How to sue it out and proceed on it; F. N. B. 18. i.

And he may have a *scire facias ad audiendum errores*, as in error. F. N. B. 18. f. g. Or now he may serve a rule as in cases of error.

Or, if the defendant has day by the roll, the plaintiff may assign errors without a *scire facias* against him.

The writ of *false judgment* ought to be served in court. 6 Hen. 7. 16. a.

And being served, shall be a *superfedeas* to all proceedings below. 6 Hen. 7. 15. b. operates as a superfedeas.

Upon *two sci. fa. ad aud. errores* awarded, and *nihil* returned, or *scire feci* and default made, the judgment shall be reversed.

If a writ of false judgment abates, or the plaintiff therein is nonsuited, the defendant shall have a *scire facias quare executionem non*. F. N. B. 18. g. Of its abating.

If upon false judgment brought, which ought to be served in court, and the lord refuses to hold his court, a *disfringas tenere curiam* goes against him. 6 Hen. 7. 16. a.

When the parties are once in court, the subsequent proceedings in *false judgment* are the same as in error.

A writ of false judgment was delivered to the undersheriff, but no money was tendered or paid for the return; for want whereof, the sheriff took no notice of it, and executed a writ *de executione judicii*. Upon hearing counsel on both sides, the sheriff's proceedings were held to be regular. *Per cur.*—The defendant, if he thinks fit, may proceed on his writ of false judgment. *Gale v. Hooker*, Bar. 199. Of the writ de executione judicii.

For the form of this writ, and the return, &c. thereto, see the forms in false judgment annexed to the end of this chapter.

SECTION. XI.

Forms of Writs and Proceedings in Error, &c.

Entry of a writ
of error on a
judgment in
C. B.

" *GEORGE* the Third, &c.—To his trusty and well-beloved Sir *James Eyre*, Chief Justice of the Bench, greeting: Forasmuch as in the record and process, and also in giving of judgment in a plaint which was in our court before you, and your companions, our justices of the bench, by our writ between John Doe and Richard Roe, in a plea of trespass on the case, as it is said, manifest error hath intervened to the great damage of the said Richard Roe, as by his complaint we are informed; we being willing that the said error, if any there be, should be duly amended, and full and speedy justice done to the said parties in this behalf, do command you, that if judgment be given thereupon, then you send to us distinctly and plainly under your seal, the record and process of the said plaint, with all things touching the same, and this writ; so that we may have them on the morrow of the Holy Trinity, wheresoever we shall then be in *England*, that inspecting the record and process aforesaid we may cause further to be done thereupon for amending the said error, as of right, and, according to the law and custom of *England*, shall be meet to be done. Witness ourself at *Westminster*, the 8th day of May, in the 36th year of our reign."

The answer of Sir *James Eyre* to the foregoing writ.

Return to writ. " The record and process, whereof mention is within made, follow in these words, to wit:

Transcript.

" Pleas at *Westminster*, before Sir *James Eyre*, knight, and his brethren, justices of the bench of the lord the king, at *Westminster*, of the term of *Easter*, in the 36th year of the reign of our sovereign lord *George* the Third, by the grace of God of *Great Britain, France, and Ireland*, king, defender of the faith, &c. and in the year of our Lord 1796.—Roll. 295. *Middlesex*, to wit: Richard Roe, late of *Westminster* in said county of *Middlesex*, gentleman, was attached to answer John Doe in a plea of trespass on the case, &c. And thereupon," &c. (*Here follows verbatim the declaration*). " And the said Richard, by T. S. his attorney, comes and defends the force and injury when," &c. (*Here follow the pleadings verbatim, as the case may be*): Or if judgment by default, the whole is set out, with the award of inquiry

inquiry and inquisition, together with the final judgment of the court, down to "And the said Richard, in mercy," &c. precisely in the same way as the record is made up and completed, in order to be docketed.

"George the Third, &c.—To the sheriff of *Middlesex*,
greeting: Whereas John Doe, lately in our court, before
Sir *James Eyre*, knight, and his companions, our justices
of the bench at *Westminster*, by our writ, and by the judg-
ment of the same court, recovered against Richard Roe,
late of *Westminster* in your county, yeoman, 30*l.* for his
damages, which he had sustained as well by occasion of the said
Richard Roe not having performed certain promises and under-
takings lately made by him to the said John Doe, as for his
costs and charges by him about his suit in that behalf expended,
whereof the said Richard Roe is convicted, as by the re-
cord and proceedings thereof, which we lately caused to be
brought into our court before us, for certain causes of
error, manifestly appear. And now, on behalf of the said
John Doe, we have received information, that although
the said judgment be given in form aforesaid, yet execu-
tion of the said damages still remains to be made to him;
wherefore the said John Doe hath intreated us to provide
him a proper remedy in this behalf; and we, being willing
that what is just should be done on this occasion, com-
mand you, that by honest and lawful men of your baili-
wick, you make it known to the said Richard Roe, that
he be before us on _____ wheresoever we
shall then be in *England*, to shew if he has or knows of
any thing to say for himself, why the said John Doe ought
not to have execution against him of the damages afore-
said, according to the force, form, and effect of the said
recovery, if it shall seem expedient to him so to do, and
further to do and receive what our said court before us
shall consider of him in this behalf; and have you there
the names of those by whom you shall make it known
to him, and this writ. Witness *Lloyd* lord *Kenyon* at
Westminster, the _____ day of _____ in the 36th year
of our reign.

Scire facias
quare execu-
tionem non;

or as the case
may be.

"Mansfield and Way."

The entry of a *non pros* after *scire facias quare executionem non*,
now in error for want of assigning errors:

"Afterwards, to wit, on Monday next after eight days
of St. Martin, in this same term, before our lord the
king at *Westminster*, comes the said John Doe, by his at-
torney aforesaid, and says, that execution of the judgment
aforesaid still remains to be made unto him; therefore he

Non pros after
scire facias
quare execu-
tionem.

"prays

" prays the writ of the lord the king to be directed to the
 " sheriff of the county of *Middlesex* aforesaid, that he make
 " known to the said Richard, to be before the said lord the
 " king, wheresoever, &c. to shew if any thing he has or
 " knows to say for himself, why the said John ought not to
 " have execution of his damages, costs, and charges afore-
 " said, according to the form and effect of the judgment
 " aforesaid; and it is granted to him, &c. by which it is
 " commanded to the sheriff aforesaid, that by good and
 " lawful men of his bailiwick, he make known to the said
 " Richard, that he be before the lord the king [*the return*
 " *of the scire facias quare, &c.*] wheresoever, &c. to shew
 " in form aforesaid, if, &c.; and further, &c. the same day
 " is given to the said John; at which day the said John, by
 " his attorney aforesaid, comes before our lord the king at
 " *Westminster*, and offers himself against the said Richard in
 " the plea aforesaid; and the said sheriff, to wit,
 " esq. and esq. sheriff of the said county of
 " *Middlesex*, returns that by virtue of the said writ to him
 " directed by and good, &c.
 " he has given notice to the said Richard to appear, &c. to
 " shew cause, &c. as by that writ he was required; and the
 " said Richard, being solemnly called, doth not come, but
 " makes default; and hereupon the said John says, that the
 " said Richard hath assigned no error or errors in the record
 " and proceedings aforesaid, or in the giving the judgment
 " aforesaid; therefore a day is given to the parties afore-
 " said, to come before our lord the king, on Monday on the
 " morrow of St. Martin, wheresoever, &c.; that is to say,
 " for the said Richard to assign error or errors in the record
 " and proceedings aforesaid, or in the giving the judgment
 " aforesaid; at which day, before our lord the king at *West-*
 " *minster*, comes the said John by his attorney aforesaid;
 " and the said Richard, being solemnly called, doth not
 " come, but again makes default; nor has he farther pro-
 " secuted the said writ of error against the said John; there-
 " fore it is considered, that the said John do recover against
 " the said Richard, as well his damages aforesaid, as also
 " 7*l.* adjudged to him by the court of our lord the king
 " now here, according to the form of the statute in such
 " case made and provided, for his damages, costs, and
 " charges, which he has sustained by occasion of the delay
 " of execution of the judgment aforesaid, by means of the
 " prosecution of the said writ of error, which damages in
 " the whole amount unto £. ; and that the said John
 " have execution thereof, &c.; and the said Richard, in
 " mercy," &c.

The

The assignment of errors, that there is no original writ filed of record.

" In the King's Bench.

" Michaelmas Term, in the 36th year of the reign of King George the Third.

" Doe } Afterwards, (that is to say,) on Monday on
 " against } the morrow of Saint Martin, in this same term,
 " Roe. } before our lord the king at *Westminster* comes
 " the said Richard, by his attorney, and says, that
 " in the record and proceedings aforesaid, and also in the
 " giving of the judgment aforesaid, there is manifest error
 " in this, (to wit,) that the declaration aforesaid, and the
 " matters therein contained, are not sufficient in law for the
 " said John to have and maintain his aforesaid action there-
 " of against the said Richard. There is also error in this,
 " (to wit,) that by the record aforesaid, it appears, that the
 " said Richard was attached to answer the said John in the
 " plea aforesaid; yet no original writ between the parties
 " aforesaid, in the plea aforesaid, is filed of record in the
 " said court of the said lord the king of the Bench at *West-*
 " *minster* aforesaid; therefore in that there is manifest error.
 " There is also error in this, that it appears by the record
 " aforesaid, that the judgment aforesaid, in form aforesaid
 " given, was given for the said John against the said Rich-
 " ard; whereas by the law of the land, the said judgment
 " ought to have been given for the said Richard against the
 " said John. And the said Richard prays a writ of the lord
 " the king to be directed to the *custos breviarum* of the said
 " court of the Bench at *Westminster*, to certify to the said
 " lord the king the truth of the same; and it is granted to
 " him, &c. And the said John prays, that the judgment
 " aforesaid, for the errors aforesaid, and other errors in the
 " record and proceedings aforesaid, may be reversed, annul-
 " led, and altogether held for nothing; and that he may be
 " restored to all things which he hath lost by occasion of
 " the said judgment, &c.

Diminution
alleged.

" A. Chambre."

The *Certiorari* to certify the Original Writ.

" George the Third, &c.—To our right, trusty, and well- *Certiorari*.
 " beloved A. B., C. D., E. F., and G. H. esqrs., holding
 " the office of keeper of the writs, rolls, and records of our
 " court of the Bench, greeting: We being willing, for cer-
 " tain causes to be certified, whether any original writ be-
 " tween John Doe and Richard Roe, late of *Westminster* in
 " the county of *Middlesex*, yeoman, in a plea of trespass
 " on

“ Easter term in the 35th year of the reign of our said
 “ lord the king ; and that there was an original writ between
 “ the parties in the said writ of *certiorari*, named in a plea
 “ of trespass on the case, directed to the sheriff of *Middle-*
 “ *sex*, in their custody, filed of record of the term aforesaid;
 “ the tenor of which said original writ, together with the
 “ return and indorsement thereof, as fully as the same re-
 “ mained in their custody, filed of record, they the said keep-
 “ er of the writs, rolls, and records aforesaid, thereby cer-
 “ tified to the said lord the king, as appeared by the schedule
 “ thereunto annexed, as the said keeper was in the said writ
 “ of *certiorari* commanded. And which said schedule, so
 “ annexed to the said writ of *certiorari*, follows in these
 “ words, to wit : *George the Third, &c.*—To the sheriff of
 “ *Middlesex*, greeting : If John Doe shall give you security
 “ to prosecute his suit, then put under sureties and safe
 “ pledges Richard Roe, late of *Westminster* in your county,
 “ yeoman, that he be before our justices at *Westminster* in
 “ fifteen days from the day of Easter, to shew ; for that
 “ whereas [*to the end of original writ, then add sheriff's in-*
 “ *dorsement, viz. Pledges to prosecute J. D. and R. R.*
 “ The within-named John Gregory hath not any thing in
 “ my bailiwick whereby he can be attached. The answer
 “ of esq. and esq. sheriff,
 “ attorney.] Which said writ of *certiorari*, together with
 “ the return of the same, among the records without day of
 “ Easter term aforesaid, is filed. And hereupon afterwards,
 “ to wit, Saturday next after eight days of St. Martin, in
 “ Michaelmas term, in the 36th year of the reign of the
 “ said lord the king, the said John Doe, by
 “ his attorney, freely comes here into court, and says, there
 “ is no error either in the record and proceedings aforesaid,
 “ or in giving the judgment aforesaid ; and he prays, that
 “ the court of the said lord the king now here may proceed
 “ to examine as well the record and proceedings aforesaid,
 “ as the matters aforesaid for errors assigned ; and that the
 “ judgment aforesaid, in form aforesaid given, may be in all
 “ things affirmed. But because the court of the said lord
 “ the king now here is not yet advised what judgment to
 “ give of and upon the premises, a day is given therefore to
 “ the parties aforesaid to come before the said lord the king,
 “ on wheresoever the said lord the king shall
 “ then be in *England*, to hear the judgment aforesaid ; for
 “ that the court of the said lord the king now here is not
 “ yet advised thereof,” &c.

" In Chancery.

" Between $\left\{ \begin{array}{l} \text{John Doe, Plaintiff,} \\ \text{and} \\ \text{Richard Roe, Defendant.} \end{array} \right.$

" To the Right Honourable the Master of the Rolls:

" The Humble Petition of the Plaintiff

" Sheweth,

" That your petitioner having commenced an action at
" law in his majesty's court of Common Pleas at *Westmin-*
" *ster*, against the above-named defendant, in a plea of tres-
" pass upon the case, in which the *venue* is laid in *Middle-*
" *sex*: your petitioner in Easter term last obtained final
" judgment in the said action for 28*l.* 10*s.*, whereupon
" the said defendant brought a writ of error returnable on
" the morrow of the Holy Trinity, but no further proceed-
" ings have been had.

" That inasmuch as it is necessary that an original writ
" should be out of his majesty's high court of Chancery to
" warrant the said proceedings, and the time for applying
" for the same in the ordinary course being expired, the cur-
" ritor of *Middlesex* has not now authority to issue the said
" writ without your Honour's order for that purpose.

" 20th May 1796.
" Be it so; and let
" the petitioner pay
" the defendant his
" costs in error, in
" case the defend-
" ant does not, after
" having had notice
" of this order, fur-
" ther prosecute his
" said writ of error,
" and hereof give
" notice forthwith.
" Thomas Sewell "

" Your petitioner therefore humbly
" prays your Honour to grant an order
" for the curritor of *Middlesex* to issue an
" original writ in the above cause, out of
" his majesty's high court of Chancery,
" returnable in his majesty's court of
" C. P. in fifteen days from the day of
" Easter last past.

" And your petitioner shall ever pray,
&c.

Form of Writ *ad audiendum Errores*.

Writ ad audi-
endum errores.

" *George* the Third, &c.—To the sheriff of
" greeting: Forasmuch as in the record and proceedings,
" and also in the giving of the judgment in a certain plaint
" lately levied in our court of before the judges
" of the same court, between A. B. and C. D., of a plea of
" trespass on the case, manifest error, as it is said, hath in-
" tervened to the great damage of the said C., as by his
" complaint we are informed; which said record, and pro-
" ceedings therein, we have, for certain reasons, caused to
" come in our court before us; and we, being willing, if
" any error there be, to correct the same, and to do unto
" the

" the parties aforesaid full and speedy justice in this behalf,
 " do command you, that, by good and lawful men of your
 " bailiwick, you make known to the said A. that he be be-
 " fore us in _____ wheresoever we shall then be in
 " England, to hear the proceedings aforesaid, if it shall seem
 " expedient unto him; and further, to do and receive what
 " in our said court before us shall be considered of him in
 " this behalf, and have there the names of them by whom
 " you shall make known unto the said A. as aforesaid; and
 " this writ. Witness," &c.

Form of Affirmance to be entered on the Roll after the
 Argument.

" At which day, before our lord the king at *Westminster*,
 " come the parties aforesaid, by their attornies aforesaid;
 " whereupon as well the record and proceedings aforesaid,
 " and the judgment given in form aforesaid, as the matters
 " aforesaid, by the said Richard above for error assigned,
 " being seen and fully understood by the court of the said
 " lord the king now here, and mature deliberation had
 " thereupon; for that it appears to the court of our said
 " lord the king now here, that there is no error either in the
 " record and proceedings aforesaid, or in giving the judg-
 " ment aforesaid; therefore it is considered that the judg-
 " ment aforesaid, given in form aforesaid, be in all things
 " affirmed; and it is further considered that the said John
 " do recover against the said Richard, as well his damages
 " aforesaid, as also 14 *l.* adjudged to him by the court of our
 " lord the king now here, according to the form of the sta-
 " tute in such case made and provided, for his damages,
 " costs, and charges which he has sustained by occasion of
 " the delay of execution of the judgment aforesaid, by
 " means of the prosecution of the said writ of error, which
 " said damages, costs, and charges in the whole amount
 " unto 42 *l.* 10s., and that he have execution thereof, &c.,
 " and the said Richard, in mercy," &c.

Form of affirm-
 ance of judg-
 ment in B. R.

*Writ of Fi. Fa. and Ca. Sa. after Affirmance by K. B. of
 Judgment in C. B.*

Fi. Fa.

" George the Third, &c.
 " —To the sheriff of *M.*
 " greeting: We command
 " you, that you cause to be
 " made and levied of the
 " goods and chattels in your
 " bailiwick

Ca. Sa.

" George the Third, &c.
 " —To the sheriff of *M.*
 " greeting: We command
 " you, that you take Rich-
 " ard Roe, late of *Westmin-*
 " ster in your county, yeo-
 " E c 2 " man,

Form of writ of
 fi. fa. and ca. fa.
 after affirmance
 in K. B.

“ bailiwick of Richard Roe,
 “ late of *Westminster* in your
 “ county, yeoman, 28*l.* 10*s.*
 “ which John Doe, lately in
 “ our court, before
 “ and his brethren, (then)
 “ our justices of the bench
 “ at *Westminster*, recovered
 “ against the said Richard,
 “ man, if he shall be found
 “ in your bailiwick, and him
 “ safely keep, so that you
 “ may have his body before
 “ us in eight days of Saint
 “ Hilary, wheresoever we
 “ shall then be in *England*,
 “ to make satisfaction to
 “ John Doe for 28*l.* 10*s.*
 “ which the said John, late-
 “ ly in our court, before
 “ and his
 “ companions, (then) our
 “ justices of the bench at
 “ *Westminster*, recovered a-
 “ gainst the said Richard,
 “ for his damages which he sustained, as well by reason of
 “ the said Richard’s not having performed certain promises
 “ and undertakings made by him to the said John, as for
 “ his costs and charges which he had been put unto about
 “ his suit in that behalf, whereof the said Richard was
 “ convicted, as by the record and proceedings thereof,
 “ which we lately caused to come into our court before us
 “ for certain causes of error, and now there remaining, it
 “ appears to us of record; and also 14*l.* adjudged to the
 “ said John in our said court before us, according to the
 “ form of the statute in such case made and provided, for
 “ his damages, costs, and charges which he hath sustained
 “ and expended by occasion of the delay of the execution of
 “ the judgment aforesaid, by the prosecution of our said
 “ writ of error, the said judgment being in our said court
 “ before us in all things affirmed, whereof the said Richard
 “ is also convicted, as appears to us likewise of record:
 “ And have you the said “ And have you there this
 “ monies before us in eight “ writ. Witness *Lloyd* lord
 “ days of Saint Hilary, “ *Kenyon*, at *Westminster*, the
 “ wheresoever we shall then “ 28th day of November, in
 “ be in *England*, to render to “ the 36th year of our reign.
 “ the said John for his da- “ “ Mansfield and Way.”
 “ mages, costs, and charges
 “ aforesaid, and also this
 “ writ. Witness,” &c.

Writs

Writs of Execution on Non Pros after Sci. Fa. quare Executionem non.

Fi. Fa.

Ca. Sa.

Form of fi. fa.
and ca. sa. after
non pros, or sci.
fa. quare, &c.

" George the Third, &c.
" —To the sheriff of *M.*
" greeting: We command
" you, that you cause to be
" levied of the goods and
" chattels in your bailiwick
" of Richard Roe, late of
" *Westminster* in your coun-
" ty, yeoman, 35 *l.* 10 *s.*

" George the Third, &c.
" —To the sheriff of *M.*
" greeting: We command
" you, that you take Rich-
" ard Roe, late of *Westmin-*
" *ster* in your county, yeo-
" man, if he shall be found
" in your bailiwick, and safe-
" ly keep him, so that you
" may have his body before
" us in eight days of Saint
" Hilary, wheresoever we
" shall then be in *England*,
" to make satisfaction to John
" Doe for 35 *l.* 10 *s.*

" which were awarded to the said John in our court before
" us, according to the form of the statute in such case made
" and provided, for his damages, costs, and charges which
" he sustained by occasion of the delay of execution of a
" certain judgment obtained by the said John against the
" said Richard, for 28 *l.* 10 *s.* in our court, before Sir
" James Byre knight and his companions, our justices of
" the bench at *Westminster*, as by the record and proceed-
" ings thereof, which for certain causes of error we lately
" caused to be brought into our said court before us, and
" now there remaining, appears to us of record; and for
" that the said Richard afterwards, in our court before us,
" did not prosecute his said writ of error, as also appears to
" us of record:

" And have you the said " And have you there this
" monies before us in eight " writ. Witness," &c.
" days of Saint Hilary, where-
" soever we shall then be in
" *England*, to render to the
" said John, for his damages,
" costs, and charges afore-
" said, and this writ. Wit-
" nesses," &c.

Writ of Restitution on the Reversal by K. B. of a Judgment given in C. B.

Writ of restitu-
tion.

" George the Third, &c.—To the sheriff of *M.* greeting:
" Whereas A. S. lately, that is to say, in Trinity term in
" the 35th year of our reign, before Sir James Eyre knight
" and

“ and his companions, our justices of the bench at *West-*
 “ *minster*, by our writ, and by the consideration of the said
 “ court, recovered against I. O. late of *Westminster*, yeoman,
 “ 100*l.*, which in our said court of the bench were awarded
 “ to the said A., as well on account of the said I. not hav-
 “ ing performed certain promises and undertakings by the
 “ said I. made to the said A., as for her costs and charges
 “ which she had been put unto about her suit in that be-
 “ half, whereof he is convicted as by the record and pro-
 “ ceedings thereof, which we lately caused to be brought
 “ into our court before us, for certain causes of error ap-
 “ pears to us of record. And whereas we, by reason of
 “ divers errors in the said record and proceedings, and also
 “ in giving the said judgment, have reversed and totally an-
 “ nulled the same; it is therefore considered and adjudged
 “ in our said court before us, that the said I. be restored to
 “ all things which he hath lost by occasion of the said judg-
 “ ment. And for that the said A. sued out execution upon
 “ the said judgment; and he the said I. was thereupon
 “ taken in execution for the same, and detained in prison
 “ until the payment was made to the said A. of the said
 “ 100*l.* Therefore we command you,

Fi. Fa.

Ca. Sa.

“ that of the goods and chat- “ that you take the said A.,
 “ tels of the said A. in your “ if she shall be found in
 “ bailiwick, you cause to be “ your bailiwick, so that you
 “ made and levied the said “ may have her body before
 “ 100*l.*; and have you that “ us on the morrow of the
 “ money before us on the “ Holy Trinity, wherefoever
 “ morrow of the Holy Tri- “ we shall then be in *Eng-*
 “ nity, wherefoever we shall “ *land*, to make satisfaction
 “ then be in *England*, to re- “ to the said T. O. for the
 “ store to the said I. the said “ said 100*l.* so awarded to
 “ money, awarded to him “ him by our said court be-
 “ by our said court before “ fore us, upon the reversal
 “ us, upon the reversal of “ of the said judgment; and
 “ the said judgment; and “ have there this writ. Wit-
 “ have there this writ. Wit- “ nefs *Lloyd* lord *Kenyon*, at
 “ nefs,” &c. “ *Westminster*, the 5th day
 “ of June, in the 35th year
 “ of our reign.

“ Mansfield and Way.”

The same forms of *testatum*'s and *non omittas*'s, which are
 used in common executions, may be added to any of these
 as occasion requires.

Form

*Form of Proceedings in false Judgment.*The Writ of *false Judgment* and Return into C. B.

" *GEORGE* the Third, by the grace of God, of *Great Britain, France, and Ireland*, king, defender of the faith, and so forth. To the sheriff of *Berks*, greeting: If C. D. shall give you security that his suit shall be prosecuted then in your full county, cause the plaint to be recorded, which was in the same county without our writ between A. B. and the said C. of a certain plea of trespass on the case done to the said A. by the said C. as it is said, wherein the said C. complaineth that false judgment hath been given against him in the said county; and have you the same record before our justices at *Westminster*, from Easter in fifteen days under your seal, and the seal of four lawful knights of the same county, of such as shall be present at the said record, and summon by good summoners the said A. that he be then there to hear the said record; and have you there the names of the summoners and of the said four knights, and this writ. Witness ourself at *Westminster* the day of in the 36th year of our reign."

Form of writ of false judgment

By the Lord Chancellor of *Great Britain*, at the Instance of the Defendant.

" By virtue of this writ to me directed in my full county, held at *Abingdon* the 17th day of *March*, in the 36th year of the reign of our sovereign lord *George* the Third, by the grace of God, of *Great Britain, France, and Ireland*, king, defender of the faith, and so forth, I caused the plaint to be recorded, which is in the same court, without the writ of our said sovereign lord the king, between A. B. and C. D. in a certain plea of trespass on the case done to the said A. by the said C. as it is said, wherein the said C. complaineth, that false judgment hath been given against him in the said county, which said plaint appears in a certain schedule to this writ annexed; and I have the said record before the justices within written, at the day and place within mentioned, under my seal, and the seals of four lawful knights of the same county, of such who were present at the said record; and I have prefixed the same day to the parties within written, that they might be there ready to proceed in the said plaint, as should be just according to the exigency of the said writ."

Return thereto.

" E. F. sheriff."

The Form of the Schedule annexed to the Return :

Schedule annexed.

“ At the ninth county court of O. P. esq. late sheriff of the
 “ county of *Berks*, held at *Abingdon* in and for the said
 “ county, the 18th day of October in the thirty-sixth year
 “ of the reign of our sovereign lord George the Third, by
 “ the grace of God, of *Great Britain*, and so forth, and in
 “ the year of our Lord one thousand seven hundred and
 “ seventy-nine, before G. H., I. K., L. M., and others,
 “ free suitors of the said court, came A. B. in his proper
 “ person, and complained against C. D. of a plea of trespass
 “ on the case, &c. And he found pledges for prosecuting
 “ his said plaint, to wit, John Doe and Richard Roe; and
 “ puts in his place Thomas Smith his attorney, against the
 “ said C. of the said plea, and it is granted to him. And
 “ thereupon it is commanded to Thomas Wall, bailiff and
 “ minister of the said court, that he put by surety and safe
 “ pledges the said C. so that he may be at the next county
 “ court before the said suitors of the said court, at *Abingdon*
 “ aforesaid, to be held the 15th day of November in the
 “ thirty-sixth year aforesaid, to answer to the said A. of his
 “ said plea. The same day is given to the said A. here,”
 &c.

“ At the tenth county court of the said late sheriff O. P.
 “ esq. held at *Abingdon* in and for the said county, the
 “ 15th day of November in the thirty-sixth year of the reign
 “ of our sovereign lord George the Third, by the grace of
 “ God, of *Great Britain, France, and Ireland*, king, defender
 “ of the faith, &c. and in the year of our Lord one thou-
 “ sand seven hundred and ninety-five, before I. K., L. M.,
 “ and others, free suitors of the said court, came the said A.
 “ by his attorney aforesaid, and offered himself against the
 “ said C. of his plea aforesaid: and the said Thomas Wall,
 “ bailiff and minister of the said court, now certifies to the
 “ same court, and returns to the said court here the said
 “ precept, to him in form aforesaid directed, and that he
 “ had put by sureties and safe pledges, to wit, John Denn
 “ and Richard Renn, the said C. that he might be here at
 “ this day to answer the said A. of the plea aforesaid, as it
 “ was commanded to him; upon which the said C. being
 “ solemnly required, came here in his proper person to
 “ answer the said A. of the plea aforesaid; and puts in his
 “ stead Peter Blake, his attorney, against the said A. of the
 “ plea aforesaid; and thereupon the said A. prays a day to
 “ declare against the said C. in the said plea here, until the
 “ next county court, to be held in and for the said county
 “ at *Abingdon* aforesaid, to wit, the 13th day of December
 “ in

" in the said thirty-sixth year of the reign aforesaid; and it
 " is granted to him, &c. and the same day is given to the
 " said C. here," &c.

" And at the eleventh county court of the said late sheriff,
 " held at *Abingdon* aforesaid, in and for the said county,
 " the thirteenth day of December in the thirty-sixth year of
 " the reign of our sovereign lord George the Third, by the
 " grace, &c. and in the year of our Lord one thousand
 " seven hundred and ninety-five, before W. S., T. R., and
 " others, free suitors of the said court, came as well the said
 " A. as the said C. by their attornies aforesaid; and here-
 " upon the said A. then declares in the said plea, in form
 " following; that is to say, the county court of the said
 " county of *Berks*, to wit, A. B. complains against C. D.
 " of a plea of trespass upon the case, and there are pledges
 " of prosecution, to wit, John Doe and Richard Roe. And
 " whereas the same A. B. by John Dixon his attorney,
 " complains, that whereas the said C. D." (*Here insert the*
whole declaration.)

" And the said C. by Peter Blake his attorney, defends
 " the wrong and injury, when, &c. and prays leave to im-
 " parl thereupon here until the next county court, to be
 " held in and for the said county at *Abingdon* aforesaid, to
 " wit, on the tenth day of January in the said thirty-sixth
 " year, and he hath it, &c. The same day is given to the
 " said A. here, &c. And at the twelfth county court of the
 " said late sheriff, held at *Abingdon* in and for the said
 " county, the tenth day of January in the thirty-sixth year
 " of the reign of our sovereign lord George the Third, by
 " the grace of God, &c. and in the year of our Lord one
 " thousand seven hundred and ninety-six, before W. S.,
 " T. P., S. R., and others, free suitors of the said court,
 " came, as well the said A. as the said C. by their attornies
 " aforesaid; and thereupon the said C. as before, defends
 " the wrong and injury, when, &c. and says," &c. [*Here*
insert the plea, &c. and replication, if it was at the same court;
if not, then a continuance till issue was joined.] " And the
 " said A. doth so likewise. Therefore it is commanded to
 " Thomas Wall, bailiff and minister of the said court, that
 " he cause to come here at the next county court, to be held
 " in and for the said county at *Abingdon* aforesaid, to wit,
 " on the 7th day of February in the 36th year of the reign
 " aforesaid, twelve good and lawful men of *Abingdon* aforesaid,
 " and within the jurisdiction of the said court, by
 " whom the truth of the matter might be better known,
 " and who are neither of kin to the said A. nor to the said C.
 " to make a certain jury of the country, between the parties
 " of

“ of the said plea, because, as well the said A. as the said C.
 “ between whom the contest is, have put themselves upon
 “ that jury; the same day is given by the said court here,
 “ as well to the said A. as to the said C. here,” &c.
 “ And at the thirteenth county court of the said late
 “ sheriff, held at *Abingdon* aforesaid, in and for the county
 “ aforesaid, the seventh day of February in the 36th year
 “ of the reign of our sovereign lord George the Third, by
 “ the grace of God, &c. and in the year of our Lord one
 “ thousand seven hundred and ninety-six, before I. D.,
 “ T. P., S. R., and others, free suitors of the said court,
 “ come as well the said A. as the said C. by their attornies
 “ aforesaid. And the said Thomas Wall, bailiff and minister
 “ of the said court, returned his said precept of *venire facias*
 “ to him in form aforesaid directed in all respects, served
 “ and executed. And the said jury, in form aforesaid im-
 “ panelled, being solemnly required, come, and twelve of
 “ them, to wit, G. H., I. K., &c. &c. who, to speak the
 “ truth of and upon the premises above-mentioned, being
 “ chosen, tried, and sworn, by the said court, there upon
 “ their oaths say, that the said C. [*here insert the verdict*]
 “ and assess the damages of the said A. by occasion of the
 “ said premises, besides his costs and charges by him about
 “ his suit in this respect laid out to 30 shillings, and for
 “ those costs and charges 6 pence. Therefore, it is con-
 “ sidered by the said court here, that the said A. should re-
 “ cover against the said C. his said damages, costs, and
 “ charges, to 30 shillings and 6 pence, assessed by the said
 “ jury, in form aforesaid; and also 54 shillings and 2 pence
 “ to the said A. at his request, by the said court here ad-
 “ judged, for his increased costs and charges; which said
 “ costs and charges amount in the whole to 4*l.* 4*s.* 8*d.* and
 “ the said C. in mercy,” &c.

“ And at the first county court of me E. F. esquire, the
 “ present sheriff of the county of *Berks* aforesaid, held at
 “ *Abingdon* in the same county, the 7th day of March in
 “ the year aforesaid, before I. K., T. R., W. S., and
 “ O. M., four lawful knights of the same county, I caused
 “ the said plaint, proceedings, and judgment, between the
 “ parties aforesaid, to be recorded as the writ hereunto
 “ annexed requires. In testimony whereof, as well I the
 “ said sheriff, as the said I. K., T. R., W. S., and O. M.,
 “ who were present at the said record, have caused our
 “ seals to be hereunto put, the day and place last above-
 “ mentioned.

“ E. F. esq. sheriff.”

Upon

Upon the return of the writ, the plaintiff in error must assign his errors in the following manner:

"And hereupon the said C. says, that *false judgment* is given against him in the proceedings aforesaid, in many instances; that is to say, in this, that in the said declaration, the said record above specified, there is not any positive allegation that the said A. doth complain against the said C. for the said supposed breach of promise in the said declaration specified, but the same is only alleged by way of recital; and also in this, that it doth not appear," &c. [and so on reciting the errors as they appear on the record]. "And so the said C. says, that in the said court of the said county, false judgment hath in divers instances been given against the said C. in and upon the said plaint; and he prays that the said judgment, for the said defects, and for others in the said record appearing, may be reversed, annulled, and utterly made void, as being false and erroneous; and that the said C. may be restored to every thing which he has lost on occasion of the said judgment, and that the said justices here may proceed to the examination of the said premises."

Assignment of errors thereon.

The serjeant's or counsel's name who signs it.

"And the said A. B. says, that there is no error in the proceedings aforesaid, nor is any false judgment given against the said C. D. upon the said plaint mentioned in the said record above specified; and he prays that the said justices here may proceed to the examination of the said record, and to the reformation and correction of the false judgment, if any such may be found, or appear to be given therein," &c.

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CHAPTER XIX.

Of Costs.

SEC. 1. *Of Plaintiff's Right to Costs.*

(A) In what Cases he is entitled to them.

(B) When no more Costs than Damages, and herein of the Statutes 43 Eliz. 21 Jac. 1. and 22 & 23 Car. 2.

(C) Of Plaintiff's Costs against inferior Tradesmen, under 4 & 5 W. & M.

(D) Of Plaintiff's Costs in Cases of Wilful Trespas, under 8 & 9 W. 3.

(E) Of Plaintiff's Costs where the Action ought to have been brought in the Court of Requests, and herein of the Suggestion.

SEC. 2. *Of Defendant's Right to Costs.*SEC. 3. *Of Costs where there are several Defendants and Verdict against some only, and where there is double Pleading, and some insufficient Pleas under the 4 & 5 Anne, or several Counts and Verdict only upon some, and where some Defendants let Judgment go by Default, and others go to Trial.*SEC. 4. *Of Costs in Error, and of allowing Interest on the Judgment.*SEC. 5. *Of staying Proceedings till Security for Costs is given, or until Costs of former Action are paid, and of deducting lesser Costs from the greater.*

SECTION I.

Of Plaintiff's Right to Costs.

(A)

(A) In what Cases he is entitled to them.

No costs at common law.

THERE was no such thing as costs *eo nomine* at common law, but they were generally included in the damages given by the jury. This however being discretionary, and often inadequate, the legislature thought proper to put the plaintiff's

plaintiff's title to costs upon a surer basis; and in the reign of 6 Edw. 1. passed a statute, which is the first upon the subject, and generally known by the name of the Statute of Gloucester, whereby it was enacted, that "The demandant in assize of novel disseisin, in writs of *mort d'auncester*, *cofinage*, *aiel* and *befail*, shall have damages. And demandant shall have the costs of the writ purchased, together with the damages, and this act shall hold place in all cases where the party recovers damages, and every person shall render damages where land is recovered against him upon his own intrusion or his own act."

Of the statute of Gloucester.

Though the statute says costs of the writ, it has been construed to extend to costs of the suit generally. These costs, therefore, are the *expensa litis*, such as shall be allowed upon taxation of costs by the master or prothonotary, but plaintiff is not to be allowed money expended on account of himself, or for the loss of his own time.

Construction thereof.

By the statute of Gloucester, therefore, costs are given as well in those actions mentioned in it, as in all actions whatever, in which the plaintiff, before that statute, could recover damages; but if damages were not recoverable before, no costs are thereby given. So that if a subsequent act gives damages where none were recoverable before, no costs can be recovered unless costs are expressly given also.

To what actions it extends.

How as to subsequent statutes.

There are various instances of statutes subsequent to the above statute of Gloucester giving damages; but by not mentioning costs, the party is not entitled to them, amongst which are the following:

Statute of Gloucester, c. 5. which gives an action of waste with treble damages against tenant for life, years, or in dower. Stat. of Westm. 2. c. 5. giving damages in *quare impedit* and *darrein presentment*. 5 Edw. 6. c. 14. against engrossers, and 1 & 2 P. & M. c. 12. for driving a distress out of the hundred.

Action of waste.

Quare impedit.

1 & 2 P. & M.

So, no costs in an action for *scan. mag.* because action did not lie at common law, and the statute giving the action makes no mention of costs. 2 Show. 506.

Scan. mag.

So, no costs in *formedon* or writ of right, because no damages are recoverable therein.

Formedon.

But where a certain sum is given by a subsequent statute, to a party injured in an action wherein damages were recoverable before the stat. of Gloucester, the plaintiff shall also have costs, though costs are not mentioned in such subsequent statute; as in an action by the party injured on the riot act, 1 Geo. 1. c. 5.; or on the black act, for setting fire to plaintiff's house, &c. 1 D. & E. 71.; and on statutes of hue and cry, costs are recoverable. 2 Wil. 92.

How, if damages before, recoverable.

Riot act;

Black act;

Hue and cry.

So,

Action of debt for penalty.

So, in an action of *debt* on any statute by a party grieved for a certain penalty, though such statute does not mention costs. 2 D. & E. 154. 1 H. Blac. 10.

Of double or treble damages.

So, if double or treble damages are given by a statute in any case where at common law single damages were recoverable, but not otherwise, the costs shall be doubled or trebled, though no costs mentioned in the statute. Carth. 297.

When to be had.

Pinfold's case, 10 Co. 116.

Costs are due to the plaintiff who recovers treble damages on 29 Eliz. c. 4. against the Sheriff for extortion. *Tye v. Glode*, 7 D. & E. 267.

So a party grieved, who recovers damages against sheriff for not taking bail under 23 Hen. 6. c. 9. is entitled to costs. *Cresswell v. Houghton*, 6 D. & E. 355.

What they are.

So, if statute gives treble damages and costs of suit, costs shall be trebled, Sal. 205. not only such costs as are given by the jury, but the costs adjudged *de incremento*, shall be trebled. Str. 1048.

If plaintiff obtains judgment on a demurrer, he shall have costs, provided he would have been entitled to them on a verdict; because the demurrer is a confession of damages.

So costs of *scire facias* are given by 8 & 9 W. 3. If A. recover judgment against B. before the bankruptcy of B. and after bankruptcy revive it by *sci. fa.*, the costs of *sci. fa.* relate back to the judgment, and may be proved under the commission. *Philips v. Brown*, 6 D. & E. 282.

No costs in qui tam actions.

But no costs can be recovered in any action by a common informer or prosecutor *qui tam*, unless given by the statute.

The 8 & 9 W. 3. giving costs in all suits of *scire facias* does not extend to a *scire facias* to repeal a patent prosecuted in the name of the king. *Rex v. Miles*, 7 D. & E. 367.

Jury may find costs beyond damages.

In actions founding in damages, the jury cannot regularly give plaintiff more than he counted for; yet if the jury would give him full damages, they may award him costs distinct and separate from the damages. And though such costs exceed the damages laid in the declaration, yet the plaintiff shall have both. For in such case the damages are given for the wrong, for which the action is brought, and the costs for the charge of the suit.

Of costs in case of new trials.

The party succeeding on a second trial which was granted because a special case reserved on the first was imperfectly stated, is not entitled to the costs of the first trial. *Smith v. Haile*, 6 D. & E. 71.

But where the defendant in such case gave the plaintiff a *cognovit* without going to trial a second time, he was liable to pay the costs of the former trial. *Booth v. Atherton*, 6 D. & E. 144.

Where

Where a *venire de novo* is awarded, the party succeeding is only entitled to the costs of the second trial. *Lickbarrow v. Mason*, 6 D. & E. 131. See also Vol. I. Ch. xi. Sec. ii. (D).

(B) In what Cases Plaintiff shall have no more Costs than Damages.

(B)

As by the statute of Gloucester, costs were recoverable in all cases indiscriminately where damages were recovered, however small the *quantum* of such damages, suitors were naturally encouraged to forsake the inferior courts, and to bring their causes into Westminster-hall, trifling as the nature of the demand might be, which at length became very expensive and oppressive to defendants. The legislature, therefore, to prevent this abuse, and to confine actions of small value to the courts below, by the 43. Eliz. c. 6. enacted, that "if upon any *personal action*, not being for any title or interest of land, nor concerning the freehold or inheritance of lands, nor for any *battery*, it shall be certified by the judge before whom tried, that the debt or damages recovered shall not amount to forty shillings or above, the plaintiff shall have no more costs than the debt or damages recovered."

Inconvenience of stat. of Gloucester.

How remedied.

(B. 1)

Stat. 43 Eliz.

Construction thereof.

Certificate required.

When to be granted.

Formerly refused;

of late granted notwithstanding a justification.

By *personal actions*, the statute means such actions as debt, *assumpsit*, assault, trespass *de bonis*, and all other the like actions, where the title or interest of land might not come in question, though *collaterally*, or where it is not for any battery of plaintiff's person; for it extends to trespass for beating plaintiff's dog, or the like. 3 D. & E. 37.

But it is to be observed, that it is not the mere finding by the jury of damages under 40s. which deprives the plaintiff of his costs, unless the judge thinks proper to certify.

The certificate may be granted after the trial. Say. Costs. 18.

Formerly the judges almost uniformly persisted in refusing to certify in such cases; but latterly there have been several instances of its being done. *Dand v. Sexton*, 3 D. & E. 37.

And such certificate may be given notwithstanding defendant may plead a justification. Say. 260.

(B. 2) In Cases of Slander, under 21 Jac. I. c. 16.

(B. 2)

It seems then by the above statute of Elizabeth, that the judge, by his certificate, deprives plaintiff of his costs.

The next statute upon the subject is the 21 Jac. I. c. 16. §. 6. This depends not upon any certificate, but upon the mere

21 Jac. 1.

mere verdict of a jury; for it is enacted, that "in actions
"for slanderous words, if damages are given (that is, either
"by a jury at trial, or on a writ of inquiry, for it ex-
"tends to both cases) under forty shillings, plaintiff shall
"have no more costs than damages."

What cases of
slander it ex-
tends to;

This statute means only words in themselves actionable without special damages. Therefore, for words not actionable in themselves, but only actionable by reason of special damage, the plaintiff, though he recovers damages under forty shillings, shall nevertheless have full costs. But for words in themselves actionable, although plaintiff lays special damages, if the jury gives him less damages than forty shillings, he shall have no more costs than damages. 2 Black. 1062.

though defend-
ant justifies.

Even if defendant plead *double*, and justifies, and there be a general verdict against him, it seems, if plaintiff recovers less than forty shillings, he shall have no more costs than damages under this act, if the words in themselves were actionable. 2 Wil. 258. Bar. 128.

Slander of title
not within the
act;

Slander of title, is neither within the words nor the meaning of this act; the special damage being in such case the gist of the action. Cro. Car. 141.

nor a libel.

Action for a *libel* is not within it, and plaintiff shall have his costs, though the damages given are under 40s.

Jury may give
costs.

But the statute of James only precludes the court from giving more damages; but a jury may assess what costs they please, though they give damages under 40s. Salk. 207.

(B. 3)

(B. 3) In cases of Trespass, under 22 & 23 Car. 3.

Difference be-
tween stat. of
Eliz. & Car.

The next statute on this subject is the 22 & 23 Car. 2. c. 9.; and as by the stat. of 43 Eliz. if the judge certifies where the damages are under 40s. plaintiff can have no more costs than damages: so, by the statute of Charles, if the damages be under 40s. plaintiff shall have no more costs if the judge does not certify.

22 & 23 Car. 2.

For that statute enacts, that "in all actions of trespass,
"assault, and battery, and other personal actions, wherein the
"judge at the trial shall not certify under his hand upon the
"back of the record, that an assault and battery was suffi-
"ciently proved by the plaintiff against the defendant, or
"that the freehold or title of the land mentioned in plaintiff's
"declaration was chiefly in question, the plaintiff in such
"action, if the jury find damages under forty shillings, shall
"not recover more costs than the damages found; and if
"more costs shall be awarded, the judgment shall be void,
"and defendant acquitted from the same, and may have his

"action

"action against the plaintiff for such vexatious suit, and
"recover his damages and costs of such his suit (a)."

This statute, notwithstanding the words "*other personal actions*," extends only to actions of *trespass quare clausum* *fragit*, and *assault and battery*; because the intention was not to prevent a plaintiff from recovering full costs in any action, except such wherein it was possible for the judge to certify that an *assault and battery* were sufficiently proved, or that the *freehold* or *title* of the land was chiefly in question; which *certificate* can be but in those actions.

On a *writ of inquiry* on this statute, if damages under *forty shillings* are given by the inquest, the plaintiff shall have *full costs*, because this statute is confined to the case of damages found by the jury at the trial; and does not, like the statute 21 Jac. 1. c. 16. extend to both cases.

After removal of a cause from an inferior court by defendant, if damages are given under *forty shillings*, though the judge do not *certify*, plaintiff shall have full costs. But not if the cause be removed by the plaintiff, for if so, it might make him vexatious.

This statute only prevents the court (without a *certificate* from the judge), but not the jury at the trial, from giving more costs than damages, if under *forty shillings*; therefore the jury may find costs to more than *forty shillings*, though they find damages under that sum.

The *certificate*, to entitle plaintiff to full costs upon this statute, must be granted at the trial; and must be, that an *assault and battery* was sufficiently proved, or that the *freehold*, or *title of the land* mentioned, was chiefly in question.

So that, where the judge cannot certify that an *assault and battery* was proved, or that the *freehold* or *title* was chiefly in question, the plaintiff shall recover his *full costs*, notwithstanding damages under *forty shillings*, without a *certificate*; as in *debt*, *assumpsit*, *trover*, *trespass for taking his horse, bull, or sheep*; or for cutting or breaking his net; or for taking his goods; *trespass for spoiling his goods*; *trespass for beating his servant*, per quod, &c.; or for breaking his close, and impounding his cattle (if defendant is found guilty of the impounding); or for breaking his close, and cutting and taking away his corn (if defendant is found guilty of cutting and taking the corn (b)). But in *trespass for breaking his close, and digging therein*; or for

(a) This statute, and all statutes preceding it, for prevention of frivolous and vexatious suits in the superior courts, are extended to the courts of great sessions in Wales, and courts of the counties palatine, by 11 & 12 W. 3. c. 9.

(b) But if the defendant is acquitted of cutting and taking away the corn, or of impounding the cattle, then the case is within the statute of Car. 2. and without a *certificate* plaintiff will not have full costs.

entering his house and breaking the door; or for fixing stakes on his ground; or entering his close, and throwing down fences and pales; or for entering and building a wall on his close; or upon issue of extra viam to justification of right of way; if damages are given under forty shillings, plaintiff shall not have his full costs without a certificate from the judge at the trial; because in all such cases, the freehold or title to the land or house, mentioned in the declaration, is in question.

In what cases
no certificate
necessary.

In all cases however, if it appears upon the pleadings that the freehold or title was in question, there needs no certificate to entitle the plaintiff to full costs, though the damages are under forty shillings; because the certificate could say no more than what appears on the record. As in assault and battery, if defendant justifies to the whole, for then he admits the battery. *Smith v. Edge*, 6 D. & E. 562. So, if plaintiff declares on a *clausum fregit* in one count, and for an injury to a chattel, or for taking his hog, or for an asportation in another count, and there be a general verdict, and damages under forty shillings, he shall have full costs without a certificate; because, upon the second count, it was not in the judge's power to certify. So, if trespass on land and an asportation be charged in one count, and there be a general verdict and damages under forty shillings. So, if a trespass on land, and chasing his cattle, be charged. So, if it be for breaking and entering his free warren, and killing and chasing his hares, conies, &c. But in trespass for breaking and entering a house, breaking window-shutters, and spoiling the bolts thereto; or, for breaking and entering a house, making a noise, continuing there, &c.; or, for throwing stones, &c. at plaintiff's windows belonging to his dwelling-house, and breaking the glass, &c. *Adlem v. Grinaway*, 6 D. & E. 281.; or, for breaking close, cutting down, lopping, and spoiling trees; or breaking close, treading down, digging, and taking away sods, earth, &c. for here what is called an asportation is a mode, a qualification of the injury done to the land; or, for trespass in his close with cattle, and spoiling the fruit there found; or, for breaking and entering a house, keeping plaintiff out of possession with a *per quod*; or, for breaking and locking up a house, detaining goods therein; or, for only breaking the windows of plaintiff's house; or, for assault and battery, throwing him down and thereby spoiling his clothes; in all these and the like cases, if a general verdict and damages under forty shillings are given, there shall be no more costs than damages, without a certificate. See a variety of cases, and the law fully discussed hereon, in *Hullock's Law of Costs*, Ch. i.

So in an action for mesne profits, if damages under 40s. and no certificate. *Doe v. Davis*, 6 D. & E. 593.

(C) Of Plaintiff's Costs in Actions against inferior Tradesmen, &c.

(C)

The next statute relating to plaintiff's costs, is the 4 & 5 W. & M. c. 2. s. 10. which to a certain extent repeals the stat. 22 & 23 Car. by giving plaintiff his full costs, however trifling the damages, where an action is brought against any person of the description mentioned therein for the offence therein described.

"Whereas great mischiefs do ensue by inferior tradesmen; apprentices, and other dissolute persons, neglecting their trades and employments, who follow hunting, fishing, and other game to the ruin of themselves and damage of others. It is enacted, that if any such person shall presume to hunt, hawk, fish, or fowl, (unless in company with the master of such apprentice, duly qualified by law,) such person shall be subject to the penalties of this act, and may be sued and prosecuted for their wilful trespass, in such their coming on others land; and if found guilty thereof, the plaintiff shall not only recover his damages thereby sustained, but his full costs of suit: any former law to the contrary notwithstanding."

4 & 5 W. & M.
as to suits
against inferior
tradesmen.

Who is an inferior tradesman or not, has been often a matter of dispute; some judges holding it to be a mere point of law, and that all tradesmen not qualified to hunt, &c. should be deemed inferior tradesmen and *vice versa*; whilst other judges have held it to be a mixed question of law and fact, to be observed upon by the judge in summing up, and left to the jury to determine; and by no means to include every tradesman not qualified. 2 Will. 70.

Who are inferior tradesmen within the act.

If in an action upon this statute, against defendant as a dissolute person, &c. if the plaintiff proves only the trespass, but not the circumstances under the statute, and has a verdict, he shall recover as in common actions of trespass, viz. no more costs than damages, if the damages are under 40 shillings: for not proving the special circumstances, the action is then no other than a common action of trespass.

How if that part of the case be not proved.

(D) Of Plaintiff's Costs in Cases of wilful Trespass.

(D)

The statute 22 & 23 Car. 2. above mentioned, being construed so strictly by the courts, that in *trespass quare clausum fregit* the judges could not certify, unless the freehold or title were in question; plaintiffs were frequently deprived of costs if they recovered but small damages, when the trespass they complained of was wilfully and maliciously committed. To

Of 8 & 9 W. 3. remedy this, it was enacted, by 8 & 9 W. 3. c. 11. sec. 4. as to wilful trespass. "in all actions of *trespass* in any of his majesty's courts of record at *Westminster*, wherein, at the trial of the cause, it shall appear and be certified by the judge, under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty was *wilful and malicious*, the plaintiff shall recover, not only his damages, but his full costs of suit; any former law to the contrary notwithstanding."

What shall be deemed a wilful trespass within the act.

Every *trespass* is *wilful*, within the meaning of this act, where the defendant has notice, and is especially forewarned, not to come on the land; as every *trespass* is *malicious*, though the damages may not amount to *forty shillings*, where the intent of the defendant plainly appears to have been to harass, vex, and distress the plaintiff: so that every *trespass*, that is ill-naturedly committed or done, after notice, is a *malicious trespass*. 1 D. & E. 636.

When certificate must be made.

The *certificate* on this statute must be made by the judge in court at the trial, otherwise it is void. 2 Will. 21.

And if it appear on the trial that the *trespass*, however small, was committed after notice, and the jury give less damages than 40s. the judge is bound under the statute of 8 & 9 W. 3. to certify, in order to entitle plaintiff to his costs, that *trespass* was *wilful and malicious*. *Reynolds v. Edwards*, 6 D. & E. 11.

(E)

(E) Of Plaintiff's Costs where the Action ought to have been in a Court of Conscience.

Of the 3 Jac. 1. c. 15. court of requests in London.

To discourage plaintiffs from suing in the superior courts for trifling matters, after reciting an act for the establishment of the court of requests in the city of London, for the recovery of small debts, it was enacted, by 3 Jac. 1. c. 15. sec. 4. "That if any action of *debt*, or upon the case upon an *assumpsit*, for the recovery of any debt, prosecuted against any of the persons aforesaid, in any of the king's courts at *Westminster*, or elsewhere, out of the said court of requests, it shall appear to the judge or judges that the debt to be recovered doth not amount to the sum of *forty shillings*, and the defendant in such action shall duly prove, either by sufficient testimony, or by his own oath, to be allowed by any the judge or judges of the said court where the action shall depend, that at the time of commencing such action, defendant was inhabiting and resident in the city of London, or liberties thereof; the said judge or judges shall not allow to the said plaintiff any costs of suit, but shall award the plaintiff to pay so much ordinary costs

"to

"to the defendant as he shall prove, before the said judge or judges, it hath truly cost him in defence of the said suit."

By the persons aforesaid, is meant persons inhabiting within the said city, being *tradesmen, victuallers, or labouring men*; but the statute 14 Geo. 2. c. 10. extends this act to all persons renting or keeping shop, shed, stall, stand, or seeking a livelihood in the city or liberties; which *vide*, as also the statute of James, and the exceptions in that act.

No cause of action can be brought in the county court unless the cause of action arise and the defendant reside within the county; if that be not the case, the action may be brought in the superior court, though for less than 40s. *Tubb v. Woodward*, 6 D. & E. 175.

If the defendant does not plead the statute in bar of the action in the superior court, but suffers a *verdict* to go against him, he may take advantage of such statute by entering a *suggestion on the roll*.—But if he lets judgment go by *default*, he precludes himself from taking any advantage of the statute, and cannot make a *suggestion on the roll* to have his costs; for when an inquest is taken by *default*, the defendant is out of court to all purposes but having judgment against him.

Defendant may plead it, or take advantage by suggestion; but no suggestion after default.

Notwithstanding plaintiff declares for more than *forty shillings*, yet if the jury give a verdict for less than forty shillings, being the real debt or demand at the commencement of the action, the defendant (if a person within the act) may make his *suggestion on the roll* to have his costs, and the costs of the suggestion shall also be included. But if the original debt was above *forty shillings* at the commencement of the suit, and defendant pleads, or gives in evidence a *set-off*, and plaintiff has a verdict for the balance under *forty shillings*, the defendant can make no *suggestion*.—Otherwise, if defendant gives in evidence, payment before action commenced, which reduced the debt under *forty shillings*, at the time it was commenced; so no suggestion if tender pleaded.

To what cases statute does not extend;

set off;

tender.

If defendant would take advantage of such statute, it must be by motion for leave to enter a *suggestion on the roll*, which motion must be made on an *affidavit* of the fact on the part of the defendant.

How to move for suggestion.

When the *suggestion* is entered with leave, the method is to grant a rule; and unless plaintiff pleads thereto within the time limited, or demurs, the allegation of defendant in his suggestion is taken *pro confesso*, and the officer will allow the costs, whether *single, double, or treble*, as the statute directs.

If the plaintiff an attorney by attachment of privilege sue a defendant resident in Wales for words spoken there; and

lay the *venue* in the Welch county, (in order that the cause may be tried in the next English county,) and the judge at the trial certify that the defendant was resident in Wales, &c. that fact thus certified may be suggested on the judgment-roll, in order to entitle the defendant to enter a judgment of nonsuit under stat. 13 G. 3. c. 51. *Evans v. Jones*, 6 D. & E. 500.

To what persons statute does not extend.

These statutes do not extend to cases where *executors* are defendants or attorneys, or to defendants where an attorney is plaintiff.

Since the making of this statute, *courts of requests or conscience* have been established in various places, as in Westminster, Southwark, Bristol, Gloucester, &c. and some statutes give *double costs* to the defendant, if sued in a superior court for a debt under forty shillings.

It has been determined in the court of C. B. that not only the defendant should reside, but that the cause of action should arise, within the limits of these courts to bring the case within the act. See *Smith v. O'Kelly*, 1 P. & B. 74.

Besides it is necessary to refer to the particular statutes as they differ in the mode of taking advantage of the objection.

Of 23 Geo. 2. court of requests in Westminster; defendant must plead the fact;

no suggestion.

Thus by the stat. 23 Geo. 2. c. 27. whereby a court of requests is established for the city and liberty of Westminster, and that part of the duchy of Lancaster adjoining thereto, the defendant if not liable to be sued in the court above, ought either to *plead* the statute as therein directed, or at least to make the objection at the *trial* to nonsuit plaintiff; for after verdict he cannot take advantage of it by suggestion as in other cases. 3 D. & E. 452. See also *Keay v. Rigge*, 1 P. & B. 11.

SECTION II.

In what Cases Defendant may have Costs.

(A)

(A) After Nonsuit or Verdict.

Of the Statute Marlbridge.

Of the 23 Hen. 8.

Of the 4 Jac.;

Until the 23d year of the reign of Hen. 8. a defendant was not entitled to costs in any case, except in a writ of right of ward maliciously brought, which costs were given by the statute of Marlbridge; and even from the time of Hen. 8. to the reign of James 1. a defendant was only entitled to costs in certain actions; but by the 4 Jac. 1. c. 3. "costs are allowed to defendants in all actions whatever in which the plaintiff if he recovered would be entitled to costs, and this either after nonsuit or verdict."

In

In all cases, therefore, the only question is, whether the plaintiff if he had had judgment would have been entitled to costs?

And this whether the verdict be general or special. Cro. construction thereof;
Eliz. 465.

Or, whether on the face of the declaration plaintiff shews a good cause of action or not, which used formerly to be doubted.

So it extends to a nonsuit upon a second trial after a special case reserved on the first; but upon coming on for argument, the facts not appearing properly stated, it was recommended and agreed to go to trial again, when plaintiff was nonsuited, and defendant had all his costs. Str. 300. extends only to nonsuit or verdict.

(B) After Discontinuance, *Nonpros*, and *Demurrer*.

(B)

The foregoing statutes extend only to the cases of *nonsuit* or *verdict*; but to prevent malicious attachments and arrests by *latitat*, *elegit*, and *pluries capiat* in the King's Bench, and by process in the Marshalsea court, and other inferior courts, it was enacted by 8 Eliz. c. 2. sec. 2. "That as often as any person shall sue, or cause or procure to be sued forth, any of the writs or process before mentioned, against any person, by which such person is arrested, or to which he shall appear upon the return, and put in bail, that then, if the party suing do not within three days after such bail taken, put into the same court his declaration, or if after declaration had and put in, the plaintiff shall not prosecute the same with effect, but shall willingly delay or *discontinue* his suit, or become *nonsuit* thereon, the judges shall award defendant his *costs*," &c.

8 Eliz. c. 2.
costs of non-
pros, or dis-
continuance in
B. R.

If the plaintiff enter a *nol. prof.* defendant has costs on this statute. 3 D. & E. 511.

Executors and administrators are liable to pay the costs of a *non pros*. *Higgs v. Warry*, 6 D. & E. 654.

There are like clauses for the *inferior* courts therein mentioned, but the court of Common Pleas is not within it.

But by 13 Car. 2. stat. 2. c. 2. it is enacted, that, "unless plaintiff, who has sued process out of the King's Bench and Common Pleas, shall put in his declaration against defendant in *personal actions* and *ejectment*, before the end of the term next after appearance, a *nonsuit* may be entered, and defendant shall have *costs*, to be levied as provided by the stat. 23 Hen. 8."

13 Car. 2. st. 2.
costs of non-
pros only in
C. B.

This statute, however, does not extend the provision in the 8 of Eliz. above mentioned, in case of a *discontinuance* in the

King's Bench, to the court of Common Pleas; and the reason for the omission seems to be, that in the Common Pleas a plaintiff could not *discontinue* without leave; in granting which, the court always annexed the condition of *paying costs*.

The statutes before mentioned only give a defendant his *costs* upon plaintiff's *discontinuance*, not declaring in time, upon being *non-suited*, and upon a *verdict* against him.

Costs on demurrer.
8 & 9 W. 3.
c. 11.

It was afterwards extended to judgments on demurrer; for by 8 & 9 W. 3. c. 11. it was enacted, "if any one shall commence or prosecute an action in any court of record, wherein upon any *demurrer*, either by plaintiff or defendant, demandant or tenant, judgment shall be given against such plaintiff or demandant, the defendant or tenant shall have judgment to recover his *costs*, and have execution for the same by *ca. sa.*, *fi. fa.*, or *elegit*."

To what cases it extends.

This statute only gives costs to defendant if judgment upon demurrer is given for him when the *demurrer* is to the merits, and not when the *demurrer* is to a plea in *abatement*; for if on a *demurrer* to a plea in *abatement* the plaintiff has judgment *quod respondeat ouster*, the plaintiff is not entitled to costs; and if on such *demurrer* the defendant has judgment, either *quod breve* or *billa casseter*, or *quod quarens nil capiat*, he is not entitled to costs.

And it only gives costs on demurrer in such actions wherein the plaintiff would have had costs if he had obtained a verdict therein. Therefore no costs are recoverable within this act in *formedon* or in *quare impedit*.—1 H. Blac. 530.

SECTION III.

(A) Of Costs where there are several Defendants, and Verdict against some only.

(B) Of Costs of double pleading and insufficient Pleas.

(C) Of Costs where Verdict on some of the Counts only.

(D) Of Costs where some Defendants let Judgment go by Default, and others go to Trial.

(A) Of

(A) Of Costs where several Defendants, and Verdict against some.

(A)

The above statutes only noticed defendants where all obtained the verdict, and did not provide for the case of some defendants being acquitted, and others found guilty; in which case, at common law, the *acquitted* defendant was not entitled to costs. Therefore, by the 8 & 9 W. 3. c. 11. 8 & 9 W. 3. c. 11. s. 1. it is enacted, that, "where several persons shall be made *defendants* in *trespass*, *assault*, *false imprisonment*, or *ejectment*, and any one or more shall, upon trial thereof, be acquitted by *verdict*, he or they shall recover his *costs* of suit, unless the *judge* before whom the cause shall be tried, shall immediately after the trial, in open court, *certify* upon the record, that there was a reasonable cause for making him or them defendant or defendants."

From the words of this statute, it extends only to *trespass vi et armis* and *ejectment*, not to *trespass on the case*, or *replevin*; for every statute giving *costs* is to be construed strictly, costs being in nature of a penalty. Str. 1005. 3 Burr. 1284. 1 Blac. 355.

To what cases it extends.

Nor to an action of *trover*. 3 Burr. 1285.

(B) Of Costs of double pleading and insufficient Pleas.

(B)

At the time the several statutes above mentioned were passed, a defendant could only plead one plea or justification, and was obliged to rely upon that for his defence, although he might have had other matters to allege in bar of plaintiff's action; the legislature therefore remedied this evil by an act of parliament of the 4 & 5 Anne, whereby a defendant is allowed to plead double; at the same time, by way of preventing unnecessary expence by useless pleas, they also made a provision respecting the costs. By the 4 & 5 Anne, c. 16. introduced by 4 & 5 Anne. sec. 4. it is enacted, that "a defendant or tenant in any action, or any plaintiff in *replevin*, may, with leave of the court, plead as many several matters as he shall think necessary for his defence; provided, that, if any such matter shall, upon *demurrer* joined, be adjudged insufficient, *costs* shall be given at the discretion of the court; or if a *verdict* shall be found upon any issue for plaintiff or demandant, costs shall also be given in like manner; unless the judge who tried the issue shall certify that the defendant or tenant, or plaintiff in *replevin*, had probable cause to plead such

At common law no double pleading;

"such matter upon which the said issue shall be found against him."

Construction
thereof.

This statute does not extend to *qui tam* actions, so as to give defendant liberty to plead double in them; nor to plead double in any case against the crown: nor does it extend to plead double matters which shall have different trials.

If the issue is found for plaintiff on a special plea, or there is judgment for him on a demurrer to such plea, he is to have costs by the express provision of this act, 4 & 5 Anne. But if on a demurrer to a special plea there is judgment for plaintiff, before trial on the general issue, and afterwards defendant has a verdict on the general issue, it seems the plaintiff shall not have those costs, because it appears ultimately that he had no cause of action.

Avowants
within it.

An *avowant*, though not named in the act, is within the meaning of it; if, therefore, one or more issues be found for him, and there is no certificate that plaintiff in *replevin* had probable cause to plead such *double plea*, the avowant shall have costs of that issue which is found for him. So, avowant shall pay costs on the special avowries found against him, 2 D. & E. 235.

What costs in-
tended thereby.

The costs intended by this statute are nothing more than the costs of those pleadings which have either been adjudged insufficient upon demurrer, or found by the verdict for the plaintiff; consequently the right to the general costs of the cause remains unaffected by this statute. Hullock, 106. 3 D. & E. 391.

How taxed and
paid.

And whatever these costs are when taxed, they are deducted out of the greater costs.

The certificate upon this statute is not required to be made in court at the trial of the cause; and where the judge refuses to grant it, the court have not a discretionary power whether they will allow the defendant any costs at all, but are bound by the statute to allow him some costs, though the *quantum* is left to their discretion. Bar. 140. 2 D. & E. 394.

The intention of the legislature was, that if there be several matters pleaded, some of which are found for the plaintiff, he shall be entitled to the costs of those, notwithstanding other matters are found for the defendant, which entitle him to judgment upon the whole record, unless the judge before whom the cause was tried, shall certify, that the defendant had a probable cause to plead the matters which are found against him. Tidd on Costs, 32. 2 D. & E. 391. 2 D. & E. 236.

(C) Of Costs where Verdict on some of the Counts only.

(C)

Where there are several counts in the declaration, and verdict upon one only, the courts differ in their practice as to costs, the Common Pleas allowing plaintiff his costs on the *whole* declaration; whereas in the King's Bench, neither party are allowed the costs of those counts, the issues upon which are found for the defendant. 2 Blac. 800. Say on Costs, 212.

Difference of practice in the two courts in that respect.

And in C. B. this rule holds not only where the cause of action is substantially the same in all the counts, and only varied in the mode of stating it; but even where the counts are for different and distinct causes of action. 2 Blac. 1199.

But in K. B. if there are two counts on *distinct* causes of action, and defendant suffers judgment by default on one, but pleads to the other, and on trial obtain a verdict, plaintiff shall be entitled to his costs on the first, and defendant shall have his costs taxed on the last; *Day v. Hanks*, 3 D. & E. 654; and there must be two distinct judgments on the record. *Ibid*.

But if there are two counts, and defendant pleads not guilty to one, and a justification to the other, and on demurrer to justification, judgment is for defendant; but on trial of the issue, verdict for plaintiff, defendant shall have no costs. 2 Burr. 1232.

But where different issues are joined on different *pleas*, the defendant is allowed in the King's Bench his costs on the issues found for him. Doug. 677. *Butcher v. Green*.

An enclosure act directed, that the parties, who were dissatisfied with the determination of the commissioners, might bring actions to try their right; adding, "that if the verdict should be in favour of the commissioners' determination, the costs should be borne by the plaintiff; and if against such proprietors, then by the proprietors at large." A proprietor brought an action claiming nine distinct rights, and recovered for three only: it was held, that he should only have his costs on those issues found for him, and that the defendant should have the costs of the other issues. *Braithwaite v. Bradford*, 6 D. & E. 599.

(D) Of Costs where some Defendants let Judgment go by Default, and others go to Trial.

(D)

If one defendant let judgment go by default, and the other justifies and obtains a verdict, the question of costs depends

Costs depend on nature and extent of plea in this case.

pend upon the nature and extent of the plea and cause of action.

For, if the plea goes to the *whole* cause of action, and therefore shews that plaintiff had no just ground to prosecute, both defendants shall have costs. 1 Sid. 76. 1 Will. 89.

But if the plea only goes personally to discharge the defendant who pleads it, he only shall reap the benefit of it; and the defendant who suffered judgment by default shall pay costs. *Ibid.* 3 D. & E. 656. See also Chap. xiv. Sec. i. (E)

SECTION IV.

Of Costs in Error, and of allowing Interest on the Judgment.

No costs at common law ;

first given by 3 Hen. 7. to defendants in error, who were plaintiffs below; in what cases ;

At common law there were no costs allowed on a writ of error.

The first mention of *costs* in *error* is in the 3d of Henry 7. c. 10. when it was enacted, that " if any defendant or tenant, or any other bound by any judgment, before execution, sue any writ of error to reverse such judgment, in delay of execution; that then, *if the same judgment be affirmed*, or the writ of error *discontinued*, or party suing error be *non-suited*, the person against whom it is sued shall recover his *costs and damages*, for his delay and wrongful vexation, by discretion of the justices before whom the said writ of error is sued."

As there are no damages in a writ of *error*, but only a reversal or affirmance of the judgment, this statute was made to redress the mischief that arose from writs of error to delay execution.

extends to subsequent statutes.

This statute extends to writs of error given by subsequent statutes, as the writ of error in Exchequer Chamber given by 27 Eliz. c. 8.

Double costs after verdict ;

by 13 Car. 2. stat. 2.

As a further discouragement to writs of error for the delaying of execution, especially after a *verdict*, double costs were given on such writs of error, provided the judgment was affirmed by 13 Car. 2. stat. 2. c. 2. whereby it was enacted, that " if any person prosecute *error* for reversal of judgment *after a verdict* in any court of record at Westminster, counties palatine, or great sessions in Wales, and the said judgment be *affirmed*, such person shall pay to defendant in error *double costs*, to be assessed by the court where such writ of error shall be depending, *for the delay of execution.*"

The

The above statutes give costs to *defendants in error* (the plaintiffs in the original action); but no costs are thereby given to defendants below, if the plaintiffs in the original action bring error. But to give such defendants relief it was enacted, by the 8 & 9 W. 3. c. 11. "That if, after judgment given for the defendant in any action, the plaintiff or demandant shall sue any writ of error, and the said judgment shall be afterwards affirmed, or the writ of error be discontinued, or plaintiff shall be nonsuit therein, the defendant or tenant in every such writ shall have judgment to recover his costs against such plaintiff or demandant, and have execution for the same by *ca. sa., fi. fa., or elegit.*"

Costs given to defendants in error, who were defendants below;

by 8 & 9 W. 3. c. 11.

It is observable, that by the above statutes, costs are only given in case the judgment is affirmed; but if the court of error reverse the judgment of the court below, then there are no costs on the writ of error, but only the costs of the original action, the court above on such reversal only giving such judgment as the court below in the first instance ought to have done. 1 Str. 617.

Statutes only extend to affirmance of judgment, not reversal;

But if judgment be affirmed, costs are recoverable on error, notwithstanding costs were not recoverable in the original action. 3 Burr. 1511. Str. 1084.

and give costs, though none in original action.

Executors or administrators bringing error are liable to costs when the judgment against them in the court below was as to the debt *de bonis testatoris*, and as to costs *de bonis testatoris*. & *si non de bonis propriis*. 1 H. Blac. 566.

How as to executors or administrators.

So, if it were an action charging them with a devastavit. Str. 1072.

The court of error is bound to give double costs on the affirmance of a judgment on writ of error after verdict; and it is in their discretion to give damages also, which they sometimes do in the shape of interest; for which see *post*. *Shepherd v. Macreth*, 2 H. Blac. 284.

Court of error must give double costs.

The above statutes of Hen. 7. and 13 Car. only give costs where the writ of error is *before* execution, or brought *for delay*. Whenever, therefore, error is brought *after* execution, and judgment is affirmed, no costs are allowed. Str. 1199.

Statutes only extend to error before execution.

And if execution be executed in part, costs shall be proportionably diminished. Cro. Car. 173.

In order to protect the defendant in error still further against any delay of execution, it was thought expedient not only that he should have his costs of the proceedings in error, but also should be secure in the recovery of his former judgment. It was therefore enacted by 3 Jac. 1. c. 8. "That no execution shall be stayed upon error brought in certain cases, (for which see Chap. xx. tit. Error,) unless plaintiff

Defendant further protected by bail in error;

required by 3 Jac. 1. c. 8.

" in

"in error put in *bail* for double the sum recovered to prosecute the writ of error with effect; and also to satisfy and pay, if judgment be affirmed, the debt, damages, and costs adjudged upon the former judgment, and also all costs and damages to be awarded for delaying execution."

This statute therefore prescribes the terms on which a delay of execution may take place; and by the latter words, evidently refers to the 3 Hen. 7. c. 10.

Bail in original action not liable to costs in error.

As new bail upon a different kind of recognizance must in such cases be given, the bail to the original action are not liable to pay the costs of error. *Yates v. Doughton*, 6 D. & E. 288.

Of costs on quashing writs of error.

4 & 5 Ann. c. 16.

As the above statutes only extended to the cases of *affirmance of the judgment, nonsuit, or discontinuance*; it was enacted, for preventing vexation by defective writs of error, "That upon quashing of any writ of error for variance from the record, or other defect, the defendant shall recover against the plaintiff issuing such writ, his costs as he should have had if judgment be affirmed." 4 & 5 Ann. c. 16. sec. 25.

Construction of statute.

Defendant in error shall be allowed the costs of his motion, as well as the other costs under the above statute, upon quashing a defective writ of error; *Ld. Raym.* 1403; though no costs might be recoverable in the original action; *Str.* 262; but not so if the defect of the writ was occasioned by his own acts, as by entering continuances on the judgment, or delaying the signing of the judgment till the writ of error is spent. *Str.* 139. 834.

Of interest on judgment when allowed in error.

We have hitherto considered the statutes on this subject so far as they relate to costs; but it may be proper to shew what further recompence they afford the party delayed in their execution by way of damages.

How warranted by the statutes.

Justice thereof.

It is observable, that the stat. of Hen. 7. particularly mentions *costs and damages*, clearly shewing that the legislature intended something more than the mere costs. And indeed were it otherwise, it might often be advantageous to the party against whom judgment is obtained to delay execution by writ of error, even upon payment of the costs, inasmuch as if the amount of such judgment were considerable, the very interest of the money, by delay of payment, might exceed the costs on the writ of error; for this reason, therefore, interest from the time of signing the judgment until the affirmance thereof, is now generally allowed, and added to the costs by way of damages.

Courts formerly scrupulous about it.

Formerly, indeed, the courts were very cautious in granting interest. It used therefore to be done very rarely, and that not by all the courts of error, but only by the court of Exchequer

Exchequer Chamber, established by 31 Ed. 3. holden before the lord chancellor, treasurer, and judges for examining erroneous judgments in the Exchequer, and by the King's Bench; but neither by the House of Lords, nor by the Exchequer Chamber established by 27 Eliz. c. 8. *Bodily v. Bellamy*, Burr. 1097.

By what courts formerly granted.

And even in the King's Bench it was not allowed as of course, but only by special order of the court in particular cases. *Ibid.*

But by degrees the scruples of the judges with respect to granting interest vanished, and the court of King's Bench determined, that the word *damage* in the statute of Hen. 7. must mean something more than the mere costs; and that the interest ought to be the measure of such damage. Accordingly, a rule for the master to compute interest on the sum given by the jury on the writ of inquiry, from the day of signing final judgment below, down to the time of the taxation of costs on the affirmance of such judgment after error brought, was made absolute. *Zinck v. Langton*, Dougl. 752.

Afterwards it became more of course.

And now the court of Exchequer Chamber under 27 Eliz. allow interest by way of damage; which damage is in the discretion of the court, either to grant or refuse, and also to fix the quantity of the recompence; *Shepherd v. Macreth*, 2 H. Blac. 287; in which the different acts of parliament are enumerated and explained.

Granted by court of Exchequer Chamber.

The interest seems to be computed from the signing final judgment, if after verdict; but if judgment by default, in the case of *Zinck v. Langton*, interest was given from the time of signing interlocutory judgment to the time of the affirmance.

From what time interest computed.

All the courts of error, therefore, except the House of Lords, now give interest at their discretion upon application by motion for that purpose, if not allowed on taxation of costs.

Now allowed by all courts of error, except House of Lords.

But the stat. of Hen. 7. does not extend to the House of Lords, only to courts of law; and whether the court in which error is brought can allow interest or not, must depend on that statute.

But the House of Lords give costs at their discretion, sometimes very large, and sometimes very small, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment in the court below; so that in their allowance of costs, they may, if they think fit, make the party some compensation.

Of the costs allowed by parliament.

Besides, if an action is brought upon a judgment affirmed on error in the House of Lords, the jury, by way of damages,

Costs of error in parliament allowed by a jury in an action.

may give interest upon the sum recovered by the judgment from the time of signing it; which may be done whenever, by the practice of the court in which error is brought, such interest is not allowed in costs upon the affirmance. *Entwistle and others v. Shepherd and others*, 2 D. & E. 78.

After affirm-
ance in error,
bail liable to
interest;

So, where after an affirmance in the Exchequer Chamber of a judgment obtained in B. R. a *scire facias* was brought in B. R. against the bail in error, who, by sham pleas and the like, delayed payment until the interest exceeded the costs that by the ordinary taxation they were to pay; the court on motion ordered the master to allow interest from the time of affirming the judgment by the Exchequer Chamber. *Welford v. Davidson*, Burr. 2127.

why;

The bail, therefore, are liable to the interest due subsequent to the affirmance, because when the judgment is affirmed, it becomes from that time the debt of the bail; and if an action was brought on that judgment, the jury might give damages for the detention of the debt, so as to include interest up to the time of final judgment. *Frith v. Leroux*, 2 D. & E. 57.

but not liable to
interest before
affirmance.

But in debt upon recognizance, bail in error in the Exchequer Chamber are not liable to pay interest on the judgment between the signing of the judgment in B. R. and the affirmance of it in *Cam. Scacc.*; because it is beyond their engagement, as by their recognizance they undertake only to pay what was due upon the original judgment, and the costs given in the Exchequer Chamber. *Ibid.*

No interest on
nonprossing
writ.

No interest allowed on *nonprossing* a writ of error returnable in parliament for want of transcribing; *Cumming v. Hanforth*, 14 Geo. 3. cited 2 D. & E. 58; for when final judgment is given, the demand is liquidated, and no interest can be computed.

SECTION V.

(A) Of staying Proceedings till Security for Costs is given.

(B) Of staying Proceedings in a second Action till Costs of former one paid.

(C) Of deducting lesser Costs from greater.

(A) Of

(A) Of staying Proceedings till Security for Costs is given.

(A)

There are only two cases (a) in which the court will interfere on behalf of a defendant to oblige the plaintiff to give security for costs.

Only two cases where security for costs required :

The first is when an *infant* sues, the court will oblige the *prochein ami*, or guardian, or attorney to give security for the costs, left upon a nonsuit or verdict for defendant he should not have a responsible person to resort to for his expences. 1 Will. 130. Str. 932. *Doe* on dem. *Selby v. Alston*, 1 D. & E. 491.

1st, of an infant being plaintiff ;

The second is, when the plaintiff resides abroad (2) ; in which case the court will stay the proceedings till security is given for the costs, because the plaintiff is beyond the reach of the process of the court ; and therefore defendant, if he succeeded, might not get any redress against him. *Pray and others v. Edie*, 1 D. & E. 267.

2d, of plaintiff residing abroad.

It extends therefore to plaintiffs resident in Ireland. *Fitzgerald v. Whitmore*, 1 D. & E. 362.

But before the court will grant such motion, defendant must put in bail. *De la Proux v. Duc de Biron*, 4 D. & E. 697.

In which case bail must first be put in.

In the Common Pleas the court is more strict in this respect, and do not order such security to be given, merely upon the ground of plaintiff's being resident abroad, but require an affidavit of his having gone thither to avoid payment of his debts, or of his insolvency in a foreign country, or the like. *Parquet v. Eling*, 1 H. Blac. 106.

C. B. more strict than K. B.

And to gain such rule, it is not enough that plaintiff is a foreigner, he must be resident abroad ; for it was refused on an affidavit that he was a foreigner, had left France to avoid being arrested for debt, and was in England insolvent. *Porrier v. Carter*, 1 H. Blac. 106. But see *Ganesford v. Levy*, 2 H. Blac. 118.

Plaintiff must reside abroad : being a foreigner not enough ;

Nor will the court grant it merely, because plaintiff is a foreigner, or because plaintiff is insolvent, though the action be a *qui tam* action. *Golding, qui tam v. Barlow*, Cowp. 24. *Real and others v. Mackay*, Str. 1206.

even in *qui tam* actions.

If a foreigner sue two defendants, and only one of them puts in bail, that one may require the plaintiff to give secu-

(a) But there has been an exception to this, the court of K. B. having required an uncertificated bankrupt bringing an action of trover for goods to give security for the costs, in case he should fail in his suit. *Webb v. Ward*, 7 D. & E. 296.

rity for costs without putting in bail for the other defendant. *Carr v. Shaw*, 6 D. & E. 496.

This rule will be granted even after issue joined, plaintiff being bankrupt, and having left the kingdom. *Barker v. Hargraves*, 6 D. & E. 597.

But not after defendant has agreed to take short notice of trial. *Michael v. Parski*, 2 H. Blac. 593.

(B)

(B) Of staying Proceedings in a second Action till the Costs of the former one are paid.

Formerly only
done in eject-
ment :
why.

Formerly it was held, that the courts could not stay the proceedings in a second action for the same cause until the costs of the former one were paid in any case excepting ejectments; and the reason given was, that ejectment, being the creature of the court, was considered more under the power of the court than other proceedings. *Real and others v. Mackay*, Str. 1206.

Now extended
to other actions;

But in later times this rule has been extended to other causes. In *Moulton qui tam v. Bingham*, 17 Geo. 3. it was granted in an action of bribery, plaintiff having been nonsuited in the first action. Afterwards in an action for a malicious prosecution, proceedings were stayed till the costs, which had been taxed as on a judgment in case of a nonsuit, were paid. 2 D. & E. 511. n. And lastly, after a nonsuit in trespass for taking goods, the court stayed proceedings in a second action between the same parties for the same cause until the costs of the nonsuit were paid; *Weston v. Withers*, 2 D. & E. 511; and this although plaintiff was a prisoner, and brought the second action *in forma pauperis*. Ibid.

though plaintiff
a prisoner and
pauper.

Denied in C. B.
because merits
not tried.

But in the court of C. B. it was in one case, though a vexatious one, refused, because the merits had never been tried; but *quere?* 2 Blac. 810. *Cox v. Chubb*.

Court will not
stay proceed-
ings till judg-
ment obtained
against plaintiff
satisfied.

But although defendant has recovered a judgment against plaintiff in a former action, on which same circumstances plaintiff now brings his action, the court will not stay the proceedings till the debt and costs on such judgment are paid, though upon an affidavit that defendant had never any dealings with plaintiff since that judgment, for they cannot try the merits upon affidavits. *Cooke v. Dobree*, 1 H. Blac. 10.

In what cases this rule will be granted in ejectment, see Ch. xiv. Sec. v.

(C) Of

(C) Of deducting the Costs of one Judgment from the Costs of another, or the like, and paying the Balance. (C)

If A. has recovered a judgment against B., and B. has also recovered a judgment to a greater amount against A., A. may apply to the court for leave to deduct the amount of his judgment from that of A., and pay the balance. In cases of judgments;

So, if A.'s be only the costs of a judgment of nonsuit or the like against B., he may deduct those costs. *Thrustout v. Crafter*, 2 Blac. 826. And this although the judgments be in different courts. *Barker v. Brahan*, 3 Will. 396. or costs;

So, if A. recovers against C., and C. recovers against A. and B., the court will permit C. on motion to set off the damages which he has recovered against those obtained by A. *Mitchell v. Oldfield*, 4 D. & E. 123. or different parties;

So, where there are many defendants, and some go to trial and obtain a verdict, but others suffer judgment to go by default, the court will permit the costs and damages, on the judgment by default, to be deducted from the costs taxed on the *posse* to those defendants who had a verdict. *Schoole v. Noble and others*, 1 H. Blac. 23. or many defendants.

So, where several actions brought on two policies of insurance, underwritten by the same parties (among whom were A. and B.), were consolidated; but in one of the causes which goes to trial, A. is defendant, and in the other B., and the plaintiff becomes entitled to costs in one action, and the defendant in the other; the costs shall be set off and deducted, though the defendants be different, as under all circumstances such deduction is equitable. *Nunez v. Modigliani*, 1 H. Blac. 217. Where only an equitable interest;

So, where A. brings an action against B., the expences of defending which are borne by C. and D., but A. is nonsuited, and afterwards C. brings an action against A., in which D. is interested as well as C., and C. is nonsuited. The costs of the one nonsuit may be set off against the other. *O'Connor v. Murphy*, 1 H. Blac. 657.

It seems, therefore, that in both courts whenever the party is *equitably* entitled to the costs, they may be set off; because this does not depend on the statutes of set-off, but on the equitable jurisdiction of the courts over the suitors in it. 4 D. & E. 123. why.

There is however a difference in the practice of the two courts with respect to the interest or lien which they allow the attorney in the cause to have in or upon such costs. Of the lien of the attorney.

In the King's Bench, the attorney is held to have a lien on the judgment to the extent of his costs paramount to any Difference of practice in two

courts in this
respect.
How in K. B.

claim of set-off by the parties; and therefore, on applications in this court to deduct the amount of one judgment from the other, or the like, it is upon an undertaking to pay the attorney having such lien his bill before any such set-off be made; for whenever an adverse party, against whom a judgment has been obtained, applies to get rid of that judgment, the court will take care that the attorney's bill is satisfied, *Mitchell v. Oldfield*, 4 D. & E. 124.; though they will not interfere by preventing the plaintiff from settling his own cause without first paying the attorney's bill. *Ibid.* *Randle v. Fuller*, 6 D. & E. 456.

How in C. B.

Whereas in the court of Common Pleas, it is held, that the attorney only has such a lien on the costs as is subject to the equitable claims of the parties in the cause; so that the attorney has only a lien upon what his client is entitled to have after deducting such set-off or claim of the adverse party. *Schoole v. Noble*, 1 H. Blac. 23. *Thrustout on dem.* *Barnes v. Crafter*, 2 Blac. 826.

How the motion should be framed.

Where the application is made by the party to whom the larger sum is due, the rule is for a stay of proceedings on acknowledging satisfaction for the lesser sum, by entering a *remittitur* on the record for it. 4 D. & E. 124. BuH. Ni. Pri. 336. But where the lesser sum is due to the party applying, the rule is to have it deducted, and for a stay of proceedings on payment of the balance. *Tidd on Costs*, 66

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CHAPTER XX.

Of Amendments and Jeofails.

HAVING endeavoured to point out the mode of proceeding in a suit from its commencement to its conclusion, as well in common as in particular cases, it only remains to shew what defects in the proceedings may be amended, and what inaccuracies are of no signification, and therefore not required to be corrected.

Amendments at common law.

Originally all proceedings were *ore tenus* carried on before the court by word of mouth; the *pleadings* in a cause were delivered *viva voce* at the bar; and any mistake might have been immediately rectified, until the record or judgment-roll was made up, after which the judges could not erase or amend them, unless done within the same term, in which all mistakes might be amended, because it was a roll of that term, and even a new roll might have been brought in the cause, consequently the same roll might be amended. Gil. C. P. 108. 8 Co. 157.

Proceedings formerly *ore tenus*.

Amendments only wanted when record made up.

About the middle of the reign of Edw. 3. it became the practice to draw up the declaration and pleas out of court, and deliver them in writing to the prothonotary, which the adverse party had liberty to inspect, and perhaps might have a copy thereof to enable him to give in his plea in answer. The putting of pleadings into writing was the first step towards the refinement and subtilty affected by pleaders in aftertimes, though at first they went no further than was necessary, to bring the matter in question before the court with due clearness and precision. Hist. Eng. Law, 95. It is most probable that the declaration, when delivered to the prothonotary, was entered on a roll, together with the plea of the opposite party; this was the plea roll, which afterwards became, in construction of law, a record. This roll the different parties had access to in order to frame their plea, or replication, or the like, or to take their exceptions; and when these were to be argued, the roll was brought into court as the only pleading to be referred to. This course was certainly attended with some difficulties, and led to the expedient of putting the pleadings into paper, and delivering the paper from one party to the other, the entry on the roll being deferred till the pleadings were concluded. This proceeding

Afterwards proceedings were put on the roll.

At length pleadings were delivered in paper.

Amendments became necessary.

ceeding greatly facilitated the perusal and correction of pleadings both of the party and his adversary, and made *amendments* more easy and decorous, than in the old method, which must have defaced the roll. These paper proceedings were introduced about the reign of Hen. 6. Hist. Eng. Law, 427.

Why allowed whilst proceedings in paper.

These paper pleadings, delivered to and fro, supplied the declaring and pleading *ore tenus* at the bar; and this is the foundation of amendments by the court being always allowed, whilst the proceedings remain in paper, or are *in fieri* as it is termed, that is to say, before they are recorded, because they may in such stage be amended as easily as if spoken at the bar. Str. 11.

How to be applied for.

Upon application therefore to the court by motion, or to a judge at his chambers by summons, the proceedings may always be amended, let them be in what stage they may, and whether in matter of form or substance, whilst they are in *paper*; but this is done upon equitable terms, so that the other side may not be prejudiced; 2 Burr. 756.; as paying costs, not delaying the adverse party, giving him time to plead *de novo*, which is generally two days after amendment made, or as the nature of the case may require, and the like. Sal. 47. Wilf. 7. 26. 223. 3 Sal. 31. 1 Sal. 517.

Cannot add a new count after second term.

But plaintiff cannot, by way of amending his declaration, after the end of the second term, add a new count, because it is like a new declaration, and he cannot declare after the second term. 1 Wilf. 149. 223. Say. R. 234. Though in one instance, under particular circumstances, allowed. Str. 890.

Proceedings in paper amendable at anytime.

But the other pleadings may be amended at any time whilst in paper, 2 Burr. 756.; and in one instance, even after issue joined, and the cause made a *remanet* at the assizes. Say. R. 285.

So in cases of demurrer.

Or he may, instead of amending, withdraw his replication, and reply *de novo*. 2 Burr. 756.

So pleadings may be withdrawn.

The same liberty of amending is given in cases of demurrer, whilst the proceedings are in paper, Sal. 520.; though formerly the court were more strict in this respect. Ld. Raym. 310. Sal. 50.

Amendments after argument.

So a demurrer may be withdrawn, and party be permitted to plead, and go to issue on the merits. Doug. 385. *Ayres v. Wilson*, Ibid. 452. Say. Rep. 416.

And even after argument on demurrer, amendments have been permitted; and in the case of the Dukes of Portland, the court gave leave to amend after three solemn arguments on demurrer. *Steel v. Sowerby*, 6 D. & E. 173.

And

And such amendments, whilst the proceedings are in paper, may be in *penal* actions, and even in *criminal* as well as *civil* proceedings. *Ibid.*

Amendments in penal actions, in criminal proceedings.

So, amendments upon informations are now a matter of course. *R. v. Holland*, 4 D. & E. 450.

But the court will not amend a *mandamus* after a return has been made to it. *R. v. Mayor of Stafford*, 4 D. & E. 689.

When not allowed in mandamus.

Nor in a penal action, after argument on demurrer to a plea in abatement, will they permit an amendment as to the parties in the suit. *Evans qui tam v. Stevens*, 4 D. & E. 228.

In penal actions.

Nor after proceedings had been depending so long, that plaintiff was too late to bring a new action. *Goff v. Popplewell*, 2 D. & E. 708. Provided unnecessary delay had been used on the part of the plaintiff; for otherwise, if he has proceeded with due diligence to trial, but withdrew the record from a fatal mistake being discovered, the court will afterwards permit him to amend, though the time limited by the statute has elapsed, and it would be too late to bring a new action; for amendments are in the discretion of the court. *Cross v. Kayes*, Hil. T. 36 Geo. 3.

Such are the amendments at common law, but there are also other amendments authorized by statute; these are after the record is completed; for it may be remembered, that at common law the judges could not alter the proceedings after they had become a *record*, except during the same term, of which the record was. The reason why they could alter them within that time is, that during the whole term in which any judicial act is done, the record remains in the breast of the judges of the court, and therefore the roll is alterable during the term as they shall direct. But when the term is past, the roll is the record, and admits of no alteration. Co. Litt. 260.

Amendments by statute.

But as the rigour of the common law in preventing amendments of the record was frequently productive of great hardship and injustice, and the suitors were liable to be defeated of their judgment by a mere slip or inaccuracy of their attornies or clerks in court, the legislature in the reign of Edward 3. enacted, "That by the *misprision* of a clerk, in any place wheresoever it be, no *process* shall be annulled or discontinued by mistaking in writing *one syllable* or *one letter* too much or too little; but as soon as the thing is perceived by challenge of the party, or in other manner, it shall be hastily amended in due form, without giving advantage to the party that challengeth the same, because of such misprision." 14 Edw. 3. st. 1. c. 6.

How confined,

By 14 Edw. 3.

Construction thereof doubted.

Explained by 9 Edw. 5.

Made perpetual by 4 H. 6.

Power enlarged by 8 Hen. 6.

Variance amended between record and certificate thereof on certiorari.

What amendments made under the above statute.

This statute only related to proceedings before judgment; but upon the construction of it, and the extent to which it ought to be carried, much difference of opinion arose. Dyer, 342. 5 Co. 45. To obviate which the 9 Edw. 5. st. 1. c. 4. after reciting the statute of Edw. 3. declared, that "the king, considering the diversity of opinions which "had been upon the said statute, and to put the thing in "more open knowledge, had ordained by authority of parliament, that the justices before whom such plea or record "is made or shall be depending, as well by adjournment as "by way of error or otherwise, shall have power and authority to amend such record and process as afore is said, "according to the form of the same statute, *as well after judgment in any such plea, record, or process given as before judgment*, as long as the same record and process is "before them, *in the same manner* as the justices had power "to amend such record and process before judgment given "by force of the said statute of Edw. 3."

So that this statute, which was made perpetual by 4 H. 6. c. 3. only extended the power to amend *after* judgment, but still confined it to a syllable or letter as before.

But by the 8 Hen. 6. c. 12. the power of the judges was enlarged, and it is thereby enacted, "That the king's judges "of the courts and places in which any record, process, "word, pleas, warrant of attorney, writ, pannel, or return, "which for the time shall be, shall have power to examine "such records, processes, words, pleas, warrants of attorney, "writs, pannels, or returns by them and their clerks, and "to reform and amend (in affirmance of the judgments of "such records and processes) *all that which to them in their discretion seemeth to be misprison of the clerks therein, except appeals, indictments of treason, and of felonies and outlawries*, so that by such misprison of the clerk no judgment "shall be reversed nor annulled."

"And if any record, process, writ, warrant of attorney, "return, or pannel be *certified* defective, otherwise than according to the writing, which thereof remaineth in the "Treasury courts or places from whence they are certified, "the parties in affirmance of the judgments of such record "and process shall have advantage to allege that the same "writing is variant from the said certificate; and that found "and certified, the same variance shall be by the said judges "reformed and amended, according to the first writing."

Such are the statutes of amendment; and it is under the authority of the above statutes that all amendments are made of any record, at least after the term in which the record is of.

And

And by this power given to the judges, which, for the expediting of justice, the courts are willing to exercise, process, as writs and the like, bail-pieces, *nisi prius* rolls, records, judgments, and even writs in execution are amendable; for all of which see the different heads in the former part of this work, and particularly Chap. xviii. Sec. ix. (D), (E), where different instances are given of judgments being amended after error brought, and even the writ of error itself amended.

It is necessary, however, that in all such cases there should be something to amend by; as the *præcipe* whereby to amend the writ, the paper-book to amend the roll, the judge's notes to amend the verdict, and the like; by which it may appear that the variance is a mistake, and therefore in strict justice ought to be rectified.

There should be something to amend by.

For which reason also the courts make a distinction in allowing an amendment where the mistake has arisen from the act of the parties, as any defect in the pleadings, or from the mere mistake of the clerk, to which only the statutes seem to be confined.

Difference between mistakes of parties and of the clerks.

The short case of *Green v. Kennet*, 1 D. & E. 782. will serve as an illustration of all the above points.

A rule was obtained to shew cause why the bill of Middlesex, which was filed in the 24th year of the reign of the present king, should not be taken off the record to be amended according to the truth of the fact, and recorded again as of Hilary term, 25 Geo. 3.

On the other side it was insisted that the court could not amend in this instance; it appearing upon the rule itself that the bill of Middlesex, to amend which was the object of the present application, was a matter of record. In the case of *Robinson v. Raley*, where, after a verdict found on some issues and a demurrer argued as to some others, an application was made by the defendant to withdraw the demurrers and plead, *Dennison* Just. said, "The court cannot help seeing that this is upon record; therefore we cannot help this: I wish we could; because the merits seem to be with the defendant."

How far matters of record amendable.

Buller Just.—In *Robinson v. Raley*, the application was to amend the pleadings, which was the act of the parties. But the reasoning of that case does not apply to the present; for this was a mistake of the defendant, and the motion is only to amend that mistake according to the truth of the case; and besides, in this case there is something to amend by, namely, the *præcipe*; which is a circumstance by which the court has always been guided. There is a distinction between amending those mistakes which are occasioned by the act

Difference between amending mistakes of the party and of the clerks.

Something to
amend by.

Amendments
after error.

Amendment of
fines and re-
coveries.

Time of amend-
ing now en-
larged.

Of the statutes
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Why so called.

Operation
thereof.

act of the party, and those which are occasioned by the act of the clerk. As in the case of executors, if the clerk enter judgment *de bonis propriis* instead of *de bonis testatoris*, and error is brought, this court will order the entry to be amended, even if the record is sent back from the Exchequer Chamber. Here we see that this is a mere mistake of the attorney the present defendant.

Grose Just.—In the court of Common Pleas, fines and recoveries are amended every day, upon the principle that there is something to amend by. *Green v. Rennet*, 1 D. & E. 782.

And now the courts are become so liberal, that where justice requires it, they will allow of amendments at any time while the suit is depending, notwithstanding the record be made up, and the term be past; for they at present consider the proceedings as *in fieri*, till judgment is given, and that therefore till then they may amend by the common law; but when judgment is given and enrolled, no amendment is permitted in any subsequent term. 3 Blac. Com. 407.

Leave granted to amend a special *capias*, in order that an application might be made to the Master of the Rolls to procure a new original. *Carr v. Shaw*, 7 D. & E. 299.

And even after verdict, the declaration was permitted to be amended, by increasing the damages laid according to the truth of the case, as found by the jury, the former verdict being at the same time set aside, and a new trial granted, to enable defendant to make his defence to the demand so enlarged. *Tomlinson v. Blacksmith*, 7 D. & E. 132.

Desirous as the courts might be to extend the principle of amendments to the utmost stretch that the construction of the above statutes could bear, yet justice was too often impeded by writs of error brought for trifling omissions and inaccuracies in the record, which were not within the scope of the judge's power to rectify, and were therefore deemed fatal even after verdict and judgment.

To remedy this evil, various statutes have been from time to time passed, called statutes of jeofail; so termed, because when a pleader perceives any slip in the form of his proceedings, and acknowledges such error, (*je* or *jeo failé*), he is at liberty by those statutes to amend it; which amendment is seldom actually made, but the benefit of the acts is attained by the courts overlooking the exception. 3 Blac. Com. 408.

These statutes are many in number, of which a brief abstract shall be given in their order; and by them it will be found that all trifling exceptions are so guarded against, that
writs

writs of error cannot now be maintained, but for some material mistake assigned. See a further account of the history of amendments, 3 Blac. Com. 408.

The first statute upon the subject is the 8 Hen. 6. c. 12. *Stat. 8 Hen. 6. c. 12.* whereby it is enacted, "That no judgment nor record shall be reversed or avoided for any writ, process, warrant of attorney, or the like, being *raised or interlined.*"

The 32 of Hen. 8. c. 30. enacts, "That if any issue be *32 Hen. 8. c. 30* tried by the oath of twelve or more indifferent men, for the party plaintiff or demandant, or for the party of the tenant or defendant, in any action or suit at common law in any court of record, that then the justices by whom judgment thereof ought to be given, shall proceed and give judgment in the same, any *Insufficient pleading. Discontinuance aided.* mispleading, lack of colour, insufficient pleading, or jeofail, or any miscontinuance or discontinuance, or misconveying of process, misjoining of the issue, lack of warrant of attorney for the party against whom the same issue shall happen to be tried, or any other default of negligence of any of the parties, their counsellors or attornies, had or made to the contrary notwithstanding; and the said judgments thereof, so to be had and given, shall stand in full strength and force to all intents and purposes, according to the said verdict, without any reversal or undoing of the same by writ of error or false judgments, in like form as though no such default or negligence had ever been had or committed."

The 18 of Eliz. c. 14. enacts, "That if any verdict of *18 Eliz. c. 14.* twelve men, or more, shall be hereafter given in any action, suit, bill, plaint, or demand, in any court of record, the judgment thereupon shall not be stayed or reversed by reason of any default in form, or lack of form, touching false Latin, or variance from the register, or other defaults in form in any writ original or judicial, count, declaration, *Informality in, or want of original warrant of attorney, &c. aided.* plaint, bill, suit, or demand, or for want of any writ, or by reason of any imperfect or insufficient return of any sheriff or other officer, or for want of any warrant of attorney, or by reason of any manner of default in process, upon or after any aid prier or voucher, nor any such record of judgment after verdict to be given hereafter, shall be reversed for any the defects or causes aforesaid; provided that the said act shall not extend to any writ, declaration, or suit of appeal of felony or murder, nor to any indictment or presentment of felony, murder, treason, or other matter, nor to any process on any of them, nor to any writ, bill, action, or information upon any popular or penal statute."

Exception.

The

21 Jac. 1. c. 13.	The 21 Jac. 1. c. 13. enacts, "That if any verdict of twelve men or more shall hereafter be given for the plaintiff or demandant, or for the defendant or tenant, bailiff in assize, vouchee, pray in aid, or tenant by receipt, in any action, suit, bill, plaint, or demand in any court of record, the judgment thereupon shall not be stayed or reversed by reason of any variance in form only, between the original writ or bill, and the declaration, plaint, or demand, or for lack of any averment of any life or lives of any person or persons, so as upon examination the said person be proved to be in life; or by reason that the venire facias, habeas corpora, or distringas is awarded to a wrong officer, upon any insufficient suggestion, or by reason the visne is in some part misawarded, or sued out of more places, or of fewer places, than it ought to be, so as some one place be right named, or by reason that any of the jury which tried the said issue is misnamed, either in the surname or addition in any of the said writs, so as upon examination it be proved to be the same man that was meant to be returned; or by reason that there is no return upon any of the said writs, so as a pannel of the names of jurors be returned and annexed to the said writ; or for that the sheriff's name, or other officer's name having the return thereof, is not set to the return of any such writ, so as upon examination it be proved that the said writ was returned by the sheriff, or under-sheriff, or any such other officer; or by reason that the plaintiff in an <i>ejectione firme</i> , or in any personal action or suit, being an infant under the age of one-and-twenty years, did appear by attorney therein, and the verdict pass for him; provided that the said act shall not extend to any writ, declaration, or suit of appeal of felony or murder, nor to any indictment or presentment of felony, murder, or treason; nor to any process upon any of them; nor to any writ, bill, action, or information upon any popular or penal statute."
Variance.	
Want of averment of lives.	
Wrong award of venire or venue.	
Misnomer of jury.	
Want of return of writs;	
or name of officers thereto;	
or infant appearing by attorney.	
Exception.	
16 & 17 Car. 2. Omnipotent act.	The 16 & 17 Car. 2. c. 8. (called by Twyden the omnipotent act), enacts, "That if any verdict of twelve men shall be given in any action, suit, bill, or demand, in any of his majesty's courts of record at Westminster, or in the counties palatine of Chester, Lancaster, or Durham, or in his majesty's courts of the great sessions in Wales, judgment thereupon shall not be stayed or reversed, for default in form or lack of form; or by reason that there are not pledges, or but one pledge to procure, returned upon the original writ; or because
Want of pledges; or sheriff's name to return;	"the

" the name of the sheriff is not returned upon such original
 " writ, or for default of entering pledges upon any bill or
 " declaration; or for default of alleging the bringing into or want of pro-
 " court of any bond, bill, indenture, or other deed, men- test;
 " tioned in the declaration, or other pleading; or for default
 " of allegation of the bringing into court letters testamentary
 " or letters of administration; or by reason of the omission or omission of
 " of *vi & armis*, or *contra pacem*; or for or by reason of the *vi et armis*;
 " mistaking of the christian name or surname of the plaintiff or mistake in
 " or defendant, demandant or tenant, sum or sums of parties names,
 " money, day, month, or year, by the clerk, in any bill, dates, sums, &c.
 " declaration, or pleading, where the right name, surname,
 " sum, day, month, or year, in any writ, plaint, roll, or re-
 " cord, preceding, or in the same roll or record where the
 " mistake is committed, is or are at once truly and rightly
 " alleged, whereunto the plaintiff might have demurred,
 " and shewn the same for cause; nor for want of aver- Want of aver-
 " ment of *hoc paratus est verificari*; or for *hoc paratus est* ments;
 " *verificare per recordum*; or for not alleging *prout patet per*
 " *recordum*; or for that there is no right venue, so as the or of right
 " cause were tried by a jury of the proper county or place venue;
 " where the action is laid; nor any judgment after verdict, want of miseri-
 " confession by *cognovit actionem*, or *relicta verificatione* shall cordia, &c.;
 " be reversed for want of *miser cordia* or *capiatur*; or by
 " reason that a *capiatur* is entered for a *miser cordia*, or a
 " *miser cordia* for a *capiatur*; nor for that *ideo concessum est*
 " *per curiam* is entered for *ideo consideratum est per curiam*;
 " nor for that the increase of costs after a verdict in any or costs not en-
 " action, or upon a nonsuit in replevin, are not entered tered right;
 " to be at the request of the party for whom judgment is
 " given; nor by reason that the costs in any judgment
 " are not entered to be by consent of the plaintiff; but
 " that all such omissions, variances, defects, and all other
 " matters of like nature, not being against the right of the
 " matter of the suit, nor whereby the issue or trial are
 " altered, shall be amended by the justices, or other judges
 " of the courts where such judgments are or shall be given,
 " or whereunto the record is or shall be removed by writ
 " of error; not to extend to appeal of felony or murder, exception as to
 " nor to any indictment or presentment of felony, mur- criminal cases,
 " der, treason, or other matter; nor to any writ, bill, &c.
 " action, or information upon any penal statute, other
 " than concerning customs and subsidies of tonnage and
 " poundage."

It is to be observed, that by the above statutes, all defects Above statutes
 in mere matters of form are remedied, taking notice of only extended
 the several parts of the proceedings from the original writ to cases after
 verdict.

to

4 & 5 Ann.
c. 16. extends
them to judg-
ments by de-
fault, confession,
&c.

Except want of
original and
warrants.

Though want
of original or of
bill is aided, a
bad original is
not.

Stat. 27 Eliz.
and 4 & 5 Ann.
making defects
in form, causes
only of special
demurrer.

4 & 5 Ann.
c. 16. extending
27 Eliz. to some
defects hereto-
fore matters of
substance.

to the verdict; and pointing out what irregularities and mistakes therein shall be cured *after* verdict. But such defects were still fatal if there was no verdict, as in case of judgment by confession or default or the like, which occasioned the provision in the 4 & 5 Anne, c. 16. which enacts, "That all the statutes of jeofails shall be extended
" to judgments entered *upon confession, nil dicit, or non sum*
" *informatus*, in any court of record; and no such judgment
" shall be reversed, nor any judgment upon any writ of
" inquiry of damages executed thereon, shall be stayed or
" reversed, for or by reason of any imperfection, omission,
" defect, matter, or thing, which would have been aided
" and cured by any of the said statutes of jeofails, in case a
" verdict of twelve men had been given in the said action
" or suit, so as there be an *original writ or bill, and warrants*
" *of attorney* duly filed."

Still, therefore, when judgment is by default, want of an original or warrants of attorney is a good cause of error.

And even after verdict, though by the statute of Eliz. the want of an original is cured, and by the equity of that act, the want of a bill on the file, which is in the nature of an original, is also aided (Cro. Eliz. 722.); yet if there be an original, and it is a *bad* one, such *vicious* writ is not cured. So a *bad venire, distringas*, or the like, is not aided, though the *want* of one is. But where the *venire facias* was right, the *distringas* is held amendable. Ld. Ray. 1143. See *ante*, Vol. I.

Thus, of mistakes and imperfections in matters of form, as above-mentioned, no advantage can be taken after verdict or after judgment by default; still however they would have been fatal upon *demurrer*, and the proceedings held bad for any of the above informalities even upon a *general* demurrer, had not the legislature guarded against it, first by the stat. 27 Eliz. c. 5. which enacts that no want of *form* in the proceedings shall be regarded, except shewn for special cause of demurrer; and lastly, by the stat. 4 & 5 Anne, c. 16. which extends the stat. of Eliz. to many defects, which otherwise would have been deemed matter of *substance*.

The stat. 4 & 5 Anne, c. 16. enacts, "That where any
" *demurrer* shall be joined and entered in any action
" or suit in any court of record, the judges shall pro-
" ceed and give judgment, according as the very right
" of the cause and matter in law shall appear unto them,
" without regarding any imperfection, omission, or defect in
" any writ, return, plaint, declaration, or other pleading,
" *process*,

"process, or course of proceeding whatsoever, except those
 "only which the party demurring shall specially and particul-
 "larly set down and express, together with his demurrer,
 "as causes of the same, notwithstanding that such imper-
 "fection, omission, or defect, might have been taken to be
 "matter of substance, and not aided by the statute made in
 "the twenty-seventh year of queen Elizabeth, &c. so as
 "sufficient matter appear in the said pleadings upon which
 "the court may give judgment, according to the very
 "right of the cause; and therefore no advantage or ex-
 "ception shall be taken of or for an immaterial traverse;
 "or of or for default of entering pledges upon any bill
 "or declaration; or of or for the default of alleging the
 "bringing into court any bond, bill, indenture, or other deed
 "mentioned in the declaration or other pleadings; or
 "of or for the fault of alleging the bringing into court
 "letters testamentary or letters of administration; or of or
 "for the omission of *vi & armis* and *contra pacem*, or
 "either of them; or of or for the want of averment of
 "*hoc paratus est verificare*, or *hoc paratus est verificare per*
 "*recordum*; or of or for not alleging *prout patet per re-*
 "*cordum*; but the court shall give judgment according to
 "the very right of the cause as aforesaid, without regard-
 "ing any such imperfections, omissions, and defects, or
 "any other matter of like nature, except the same shall be
 "specially and particularly set down and shewn for cause of
 "demurrer."

All the above statutes only extended to civil proceedings, but by the stat. 9 Anne, c. 20. "All the statutes of jeofails
 "are extended to all writs of *mandamus*, and *informations*
 "in the nature of *quo warranto*."

9 Ann. c. 20.
 above statutes
 extended to
mandamus, &c.

It may be observed, that in the statutes of 18 Eliz.
 21 Jac. and 16 & 17 Car. 2. there is a provision that they
 shall not extend to criminal proceedings, nor to penal ac-
 tions, which provision is not in the 32 Hen. 8.; and it has
 been held that penal actions are within the stat. Hen. 8.
Richards qui tam v. Brown, Doug. 115.

How far penal
 actions within
 32 Hen. 8.

The last statute upon the subject is, the 5 Geo. 1. c. 13.
 whereby after verdict no judgment can now be stayed or
 reversed for any defect or fault either in form or substance in
 any bill, writ original or judicial, or for any variance in such
 writs from the declaration or other proceedings: this statute
 does not extend to criminal cases, but no exception is men-
 tioned as to penal actions.

5 Geo. 1. c. 13.
 all defects in
 writs aided after
 verdict.

After a rule obtained to shew cause why the *testatum*
ca. sa. should not be set aside, because not warranted by
 the

the judgment, and because there was no original *ca. sa.*, the court permitted the plaintiff to amend the *test. ca. sa.* agreeable to the judgment, and directed the sealer of the writs to seal an original *ca. sa.* to warrant it. *Shaw v. Maxwell*, 6 D. & E. 450.

And writs of error amendable.

This statute also authorises the amending of writs of error, which none of the other statutes did, because they only gave a power of amending in *affirmance* of judgments, whereas writs of error have a direct contrary tendency.

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CHAPTER XXI.

Of Passing Fines and Suffering Recoveries.

SEC. 1. *Of Passing Fines.*SEC. 2. *Of Suffering Recoveries.*

FINES and recoveries being the most common assurances and conveyances, it is highly expedient, both for the student and practitioner, to be somewhat acquainted with the nature and operation thereof, and the proceedings relative thereto. A few observations thereon cannot therefore be deemed foreign to our present purpose.

The directions as to the practical proceedings are chiefly selected from Mr. Serjeant Wilson's *Treatise on Fines and Recoveries*.

SECTION I.

*Of Passing Fines.**A Fine.—Its Nature.*

Various are the definitions given of a *fine* by the different writers on the subject. Some call it a *feoffment of record*; others, more properly, an *acknowledgment* of a feoffment of record.

But the description most suitable, perhaps, to our present purpose, as explanatory of *the mode of passing a fine*, may be the following:

A fine is an amicable agreement or compromise of a fictitious suit, grounded upon a writ of covenant, or other original writ; which agreement must be made with the king's consent and licence, and acknowledged by the parties thereto before the justices of common pleas, or others thereunto authorised, and be ingrossed of record in the same court.

Its Kinds.

There are four sorts of fines;

1. *Sur cognizance de droit come ceo qu'il ad de son done.*
2. *Sur done grant et render.*
3. *Sur cognizance de droit tantum.*
4. *Sur concessit.*

Fines are either *executed* or *executory* :

Executed, when the legal possession of the lands contained in the fine is thereby *immediately* transferred to and vested in the *conusee*, so that he may enter thereon, without any writ to put him in possession.

Executory, when such possession is *not* immediately transferred; but something further is requisite, as a writ of *habere facias seisinam*, to entitle the *conusee* to enter.

Fines are also *single* or *double* :

Single, when an estate is conveyed thereby, and nothing granted *thereout*, or *rendered back*, by the *conusees* :

Double, when there is some *grant and render back* to the *conusor*, as a rent, common, or the like.

Fines are either with *proclamations*, or without.

At common law there were no proclamations; and yet, if any stranger, having any claim to the lands or tenements conveyed by the fine, did not put in such claim within *a year and a day* after the fine levied, he was barred for ever. This was often found extremely hard, and to remedy the evil the 34 Edw. 3. c. 16. enacted, "That *nonclaim* on a fine should "be no bar;" so that at any period or distance of time whatever, the party might make his claim. But this remedy was worse than the disease, for men could never be secure in their possessions. As a medium between both extremes, the statute of 4 Hen. 7. c. 24. after ordaining that fines shall be *proclaimed* in four several terms, enacts, "That, the *proclamations* being so made, the fine is to conclude as well "privies as strangers, except *feme covert*s, infants, &c. not "being parties thereto; and saving to all strangers, any "right, claim, or interest they may have, provided they "pursue such right within five years from the time it "accrues." This statute was afterwards explained by 32 Hen. 8. Fines, therefore, passed agreeable to these statutes, are always levied with *proclamations*.

One advantage of levying a fine with *proclamations*, according to 4 Hen. 7. and 32 Hen. 8. is, that a *nonclaim* of five years makes it a complete *bar*; whereas if it be *not* with *proclamations*, a *nonclaim* will be no bar, because the statute of 34 Edw. 3. above mentioned will then prevail: besides which, a fine levied with *proclamations* is much more extensive in its operation.

The fine *sur cognizance de droit come ceo qu'il ad de son droit* is the best and surest of all fines, and therefore generally used; it is a *single* fine, *executed*; and to make it of full force, should be levied with *proclamations*.

Its Operation.

The operation of a fine is to bar the *estate-tail*, and that only; not any *remainders* or *reversions* dependant thereon; for to effect this, a *common recovery* is requisite.

But where tenant *in tail* has the immediate reversion in fee in himself, he may make a good title by fine only, all his issue being barred thereby.

But this is merely to be understood of fines levied with *proclamations*; for otherwise they have only the operation of fines at *common law*, which, when levied of an *estate-tail*, create a *discontinuance*, but do not bar the issue from bringing a *formedon*.

Of the Mode of levying a Fine.

From the description above given of a fine, it is obvious, that there are *five* things necessary to be done in passing the same. 1st, There must be an *original writ* sued out. 2d, An *agreement*, by way of compromising the suit, is to be made. 3d, The *king's consent* or *licence* for the parties to agree must be obtained. 4th, The agreement must be *acknowledged* by the parties thereto before the justices of common pleas, or others thereunto authorised. And 5th, It must be *ingrossed of record*. Add to which (provided it be levied agreeable to the statute), *proclamations* must be duly made and indorfed thereon. Of each in their order—

1. *Of the Original Writ.*

Any original writ used in *real* actions will do, but not an original in a *personal* action.

A writ of *covenant* is the one generally sued out, which writ is in this case a *real* action, for it is to have execution and performance of the covenants, as well as damages for the breach thereof. There is a certain fine called the *premier* or *pre-fine* to be paid thereon, but which is not actually paid till after the acknowledgment.

The writ is sued out by the person to whom the land is to be conveyed (called the *conusee*, for the reason hereafter given), against the person who is to convey the same (called the *conusor*), upon a supposed breach of covenant.

How to sue out same.

Make out *præcipe* for the *curstior* of the county where the lands lie, who will prepare *original*. Pay 7s. 6d. There should be fifteen days between the *teste* and *return*, and it should not be returnable until *after* the acknowledgment.

The form of the *præcipe* is as follows :

"Cambridgeshire, } Command S. B. (*the conusor*) that justly,
"to wit, } &c. he perform to J. P. (*the conusee*)
"the covenant made between them of one messuage, one
"stable, and one garden (*the parcels intended to pass by the*
"*fine*), with the appurtenances in E. And unless, &c.
"Ret'."

The most usual original writ on which a fine is now levied is a writ of covenant prepared by the *curfitor*, and generally in this form :

Writ of
covenant.

"GEORGE the Third, by the grace of God of Great
"Britain, &c. To the sheriff of Cambridgeshire, greeting :
"Command S. B. that justly and without delay he perform
"the covenant to J. P. esq. made between them of one
"messuage, one stable, and one garden, with the appur-
"tenances in E. And unless he shall so do, and the said J.
"shall give you security that his suit shall be prosecuted,
"then summon by good summoners the said S. B. that he
"be before our justices at Westminster in eight days of
"Saint Hilary, to shew wherefore they will not do it; and
"have you there the summoners and this writ. Witness
"ourselves at Westminster, the 7th day of November, in the
"thirty-eighth year of our reign."

2. Of the Concord or Agreement.

The action having been commenced, it is presumed that the conusor (or person against whom it is brought), conscious of his being in the wrong, is desirous of a compromise. To effect this, the *concord* or *agreement* is drawn up, which is an acknowledgment or recognition that the lands or tenements are the right of the demandant, "as those which the demandant has of the gift of the deforciant:" from which words it is denominated, a fine *sur cognizance de droit come ceo qu'il ad de son done*. And the person making this acknowledgment or cognizance is therefore called the *conusor*, and the person to whom it is made, the *conusee*.

The form of the *concord* is as follows :

The concord.

"And the agreement is such, (to wit,) That the aforesaid
"S. (*the deforciant in the original writ*) hath acknowledged
"the aforesaid manors (or other tenements comprised in the
"*writ*) to be the right of him the said J. (*the plaintiff*), as
"those which the said S. hath of the gift of the aforesaid
"J., and those he hath remised and quit claimed from him
"the said S. and his heirs, to the aforesaid J. and his heirs
"for ever. And for this," &c.

3. *Of the Licentia Concordandi.*

The *concord* or *agreement* being made, the third thing, as above described, to be done is, the obtaining of the *king's consent or licence* for the parties to agree, otherwise it is of no avail. This consent is procured by paying a certain fine called the *post-fine*, (in opposition to the fine first paid upon taking out the *original writ*, called the *premier* or *pre-fine*,) or sometimes the king's silver; but this is not in fact paid till after the taking of the acknowledgment. This fine *pro licentia concordandi* is paid upon the presumption that the *conusee*, having given pledges at the commencement of the suit to prosecute the same, if he should neglect so to do without the king's leave, such pledges would be liable.

It is authorized by the statute *de modo levandi fines*. Then, when they be agreed of the sum of money that must be given to the king, the justice shall say, &c. 5 Co. 39. Wils. 5.

The *licentia concordandi* is engrossed on the fine between the *præcipe* and *concord*, and is one of the parts thereof.

It is the foundation and substance of the fine, and the other subsequent parts are but abstracts therefrom; for if the king's silver be entered, although the parties, or any of them, die before the other parts are entered of record, the fine is good. Dyer, 220.

The next part of the fine is the *note* of the fine, which is but an abstract out of the original writ and the concord; and is in this form:

"Between J. P. plaintiff and S. B. deforciant, of, &c. (the parcels), whereupon a plea of covenant was summoned between them in the same court; that is to say, that the said S. hath acknowledged the aforefaid," &c. (parcels) as above.

The last part of the fine is the *foot*, which is thus—

"This is the final agreement made in the court of our lord the king at Westminster, from the day of Easter in 15 days, in the 38th year of his reign, &c. before, &c. between J. P. plaintiff and S. B. deforciant" (and so recite in effect the concord).

The foot includes all, and hath the day, year, place, and before what justices the concord was made.

The *concord* being the *very agreement* of the parties, declaring in what manner the lands shall pass, it is of the utmost consequence that it be made and acknowledged freely and openly, without any fraud, covin, or coercion.

For this reason in the above description of a fine, which is said to be *an amicable agreement of a fictitious suit made with the king's consent*, it is added, that this agreement must be acknowledged by the parties thereto *before the justices of common pleas, or others thereunto authorised*. The next thing therefore to be done is, the making

Of the Acknowledgment.

The taking of the *acknowledgment* by the justices, or others, is in consequence of the statute of Carlisle, 15 Edw. 2. which enacts, "That all the parties levying fines shall, before the passing of such fines, appear *personally* before the justices, so that their age, idiocy, or other default (if there be any) shall be adjudged and discerned by the said justices."

Who may take the Acknowledgment.

By the statute *de finibus*, 18 Edw. 1. fines should be levied before the *four* justices of the bench; but by 4 Hen. 7. before *two* of them is sufficient. Hence it is clear, that a fine acknowledged in term time in the court of C. B. must be effectual. By custom and usage also, for he does not appear authorised by any statute, the *chief justice* of the Common Pleas may himself, *out of court*, take the acknowledgment.

So that a fine may be acknowledged either *openly in court*, or *privately before the chief justice*, at his house or chambers, without any *special authority* for that purpose. But there may be other persons *specially authorised* to take such acknowledgment, occasioned by the parties living at a distance, or being unable, through sickness or other causes, to appear *personally* at Westminster. Hence fines are frequently acknowledged before *commissioners* specially appointed and authorised to take the same, by a certain writ or commission issuing out of Chancery, and directed to them, called a *dedimus potestatem*.

Sometimes also the acknowledgment is taken by a *judge on the circuit*; in which case a *dedimus* must be afterwards had to render it valid and effectual.

This practice of authorising persons by virtue of a *dedimus* to take acknowledgments, seems to be in consequence of the statute of Carlisle before mentioned, in which there is a proviso, "That if any person be by age or impotency decrepit, or by casualty so oppressed and withholden that by no means he is able to come before the justices in court, then two or one of the justices, by the assent of the *residues*"

" of the bench, shall go unto the party so diseased, and shall
" receive his *consuance*."

At this day a *dedimus* is granted of *course*, the form whereof
is as follows :

" *GEORGE* the Third, by the grace of God, of *Great*
" *Britain, France, and Ireland*, king, defender of the faith,
" &c. To our trusty and well beloved
" and to our beloved and
" gentlemen, greeting : Whereas our writ
" of covenant is depending before our justices of the bench
" between T. B. esq. and M. S. widow, P. G. and E. his
" wife, and W. C. and M. his wife, of one messuage, two
" barns, two stables, one garden, ten acres of meadow,
" thirty acres of pasture, and twenty acres of furze and
" heath, with the appurtenances, in in the county of
" *Middlesex*, that a fine may be levied thereof between them,
" before our said justices in the same bench, according to the
" law and custom of *England*, and the said M. P., E. W.,
" and M., are so infirm that they cannot, without the
" greatest bodily danger, travel to *Westminster* to make the
" acknowledgments in this behalf required at the day in our
" said writ specified, as we are informed; we, tendering
" the condition of the said M. P., E. W., and M. in this
" behalf, have given power to you, or two of you, to take
" the acknowledgments which they the said M. P., E. W.,
" and M. shall be willing to make before you, or two of
" you, concerning the premises, and therefore we command
" you, or two of you, that, going in person unto the said
" M. P., E. W., and M., you take their said acknowledg-
" ments, and when you shall have taken the same, that you
" distinctly and plainly, under your seals, or the seals of
" two of you, certify our said justices thereof, that then the
" fine aforesaid may be levied between the said parties of
" the premises before our said justices in the same bench,
" according to the law and custom above mentioned, send-
" ing to the same justices this writ. Witness ourself at
" *Westminster*, the 8th day of *November*, in the 38th year
" of our reign.

" B,

" Indorsed by the lord chancellor
" of *Great Britain* at the in-
" stance of the demandant.

" A. C."

This writ must be signed by the lord chancellor or lord
keeper, and by one of the judges of the circuit where the
lands lie,

Though this writ appears to be granted on a suggestion that the party is infirm and unable to travel, yet such suggestion is very seldom true, the writ being generally obtained to save the charge of a journey to Westminster when the party lives at a great distance.

As fines are to be levied in the court of Common Pleas only, all acknowledgments thereof must be certified to that court.

There are four ways then, we find, of acknowledging a fine :

1. *At the bar of the court.*
2. *Before the chief justice at his house or chambers* (in which cases there is no need of a *dedimus*).
3. *Before commissioners specially named and appointed.*
4. *Before a judge upon the circuit* (in which cases a *dedimus* must be had).

We shall briefly treat of each in their order.

1. *Of acknowledging a Fine at the Bar of the Court of C. B.*

Having got the writ of covenant upon your *præcipe* from the curfitor, ingross the *præcipe* and *concord* upon parchment; take the writ, *præcipe*, and *concord* to a serjeant at the bar of the court; let the *conusors* accompany you; the *serjeant* will get it passed. If one of the *conusors* be a *feme covert*, the chief justice will examine her apart as to her consent, and then deliver it to the prothonotary. Having got the writ, *præcipe*, and *concord* returned to you from the prothonotary, annex the *præcipe* and *concord* to the writ, and pass them through the offices as hereafter directed.

2. *Of acknowledging a Fine before the Chief Justice.*

There is no necessity in this case to bespeak writ of covenant till after the acknowledgment taken.

Having ingrossed *præcipe* and *concord* on parchment, make a copy thereof on paper; go with *conusors* to the house or chambers of the C. J. give both the *præcipes* and *concords* to the clerk; the C. J. will take the acknowledgment of the parties, and will sign the *ingrossed præcipe* and *concord*, which will be returned to you; the *paper* copy will be kept by the clerk; then take them to *curfitor* for the writ, if none got before, and proceed as hereafter directed in passing it through the several offices.

3. *Of*

3. Of acknowledging a Fine before Commissioners in the Country.

In the *præcipe* for the writ of covenant, name the commissioners you wish to be appointed: one ought to be a *knight*, agreeable to a rule of court, East. 43 Eliz. but of that the *curfitor* generally takes care. Carry *præcipe* to *curfitor*, who will make out the *dedimus*.

Ingross *præcipe* and *concord* on parchment as before, and send down same, with *dedimus*, into the *country* to be delivered to commissioners; or if in *town*, attend commissioners yourself with *dedimus*. Any *two* of them may take the acknowledgment, which having done, they should subscribe their names to the *caption*, and also to an *indorsement on dedimus*, that "the execution thereof appears in a schedule thereunto annexed."

They should in strictness know the *conusors*, or be informed by some person of credit, that the parties who come to acknowledge the fine are the real persons named in the *concord*. They should read the contents of the *concord* to the *conusors*, who are to acknowledge their consent thereto, and thereupon the *conusors* are to sign the *concord*. If either of the *conusors* be a *feme covert*, the commissioners should take her apart, acquaint her with the contents, effect, and consequence of the fine, and examine her whether she acknowledgeth the same voluntarily, or by compulsion, fear, or dread of her husband; in which case they ought not to take her acknowledgment. The commissioners also ought to take care that none of the parties be infants, lunatics, idiots, or otherwise unfit to be *conusors*.

It was to prevent abuses in this respect that it was ordered by rule of court, East. 43 Eliz. that no fine should be received unless acknowledged before a judge or serjeant at law, or a knight to be of the quorum. The acknowledgment having been thus taken, one of the commissioners, or some other person who was *present* at the taking of the acknowledgment, and who knows the parties, must personally appear before the C. J. or some other judge, and make oath of the due execution of the *dedimus*, agreeable to rule of court, Hil. 13 Geo. 1. The judge will then write his *allocatur* under the *concord*, for passing the fine; after which, take *præcipe*, *concord*, and *dedimus*, to *curfitor*, get the writ of covenant, and proceed as hereafter mentioned.

By way of regulating this part of the proceedings, and of settling the form of the affidavit, the following rules of court were made:

" Hilary

" Hilary Term, 17 Geo. 2. 1741.

" *Fines.*

" Whereas by a rule of this court, made in the 13th year
 " of the reign of his late majesty king George, it was ordered,
 " that no fine whatsoever, taken and acknowledged before
 " any commissioners by virtue of a writ of *dedimus potestatem*
 " to them directed, be allowed to pass, unless some person
 " present when such fine was taken and acknowledged did
 " personally appear before the lord chief justice, or some
 " other justice of this court, and was examined upon oath,
 " touching the due execution thereof, and particularly whe-
 " ther such person knew the parties acknowledging such
 " fine; which rule has been found by experience to be
 " attended with inconveniences, and has not answered all
 " the good purposes for which it was intended: For remedy
 " thereof, and the better to ascertain the practice for the
 " future,

" It is ordered by this court, that from and after the first
 " day of next Michaelmas term, instead of an oath made
 " *viva voce* of such due acknowledgment of such fines, an
 " affidavit or affidavits in writing on parchment shall be
 " made and annexed to every fine so taken as aforesaid, in
 " which affidavit or affidavits the person or persons making
 " the same shall swear that he or they knew the party or
 " parties acknowledging such fine; that the same was duly
 " signed and acknowledged; that the party or parties ac-
 " knowledging, and also the commissioners taking the same,
 " were all of full age and competent understanding; that
 " the *feme coverts* (if any) were solely and separately exa-
 " mined apart from their husbands, and freely and volun-
 " tarily consented to and acknowledged the same; and that
 " the conusor or conusors, and every of them, knew the
 " same to be a fine to pass his, her, or their estate or estates;
 " which fine, together with such affidavit or affidavits an-
 " nexed, shall be transmitted to the said lord chief justice,
 " or some other justice of this court, for his *allocatur*
 " thereon; and such affidavit or affidavits shall remain an-
 " nexed to such fine, and be left with the same in the pro-
 " per office: And it is ordered, that all and every such
 " affidavit and affidavits as aforesaid, except where the per-
 " son or persons at the time of their acknowledging the fine
 " are in Ireland, or in some other parts beyond the seas,
 " shall be made by some attorney or attornies of the courts
 " of Westminster-hall, or of the great sessions in Wales,
 " or of the counties palatine of Chester, Lancaster, and
 " Durham, and shall be sworn before a person duly autho-
 " rized to take affidavits in this court.

" And

“ And it is further ordered, that if any such affidavit or
 “ affidavits as aforesaid shall be made and annexed to any
 “ fine, and transmitted to the lord chief justice, or any other
 “ justice of this court, for his *allocatur* thereon, before the
 “ said first day of Michaelmas term, shall be received and
 “ allowed, instead of an oath made *viva voce* of the due ac-
 “ knowledgment of such fine.

“ By the Court.”

The Form of an Affidavit of the due Caption of a Fine.

“ In the Common Pleas.

“ A. B. of in the county of one of the attor-
 “ nies of his majesty's court of and one of the
 “ commissioners named in the writ of *dedimus potestatem*, for
 “ taking the acknowledgment of the fine hereunto annexed,
 “ maketh oath and faith, that he knows C. D. and E. his
 “ wife, and F. G. and H. his wife, the conusors named in
 “ the said fine, and that the same was duly signed and ac-
 “ knowledged by them before this deponent and J. K.
 “ gentleman, the other commissioner named in the said
 “ writ, and that the said C. D. and E. his wife, and F. G.
 “ and H. his wife, and also this deponent and the said J. K.,
 “ were, at the time of taking and acknowledging the said
 “ fine, all of full age and competent understanding; that
 “ the said E. and H. were solely and separately examined
 “ apart from their husbands, and freely and voluntarily
 “ consented to and acknowledged the said fine; and that
 “ the said conusors, and every of them, know the same to
 “ be a fine to pass his, her, or their estate and estates.

“ A. B.,

“ Sworn at in the county
 “ of the day of
 “ in the year of our
 “ Lord 1798, before me,
 “ L. M. one of, &c.”

Or thus, if the affidavit is not made by a commissioner,

“ In the Common Pleas.

“ A. B. of in the county of one of the attor-
 “ nies of the court of maketh oath and faith, that he
 “ knows C. D. and E. his wife, and F. G. and H. his wife,
 “ the conusors named in the fine hereunto annexed, and
 “ that the said fine was duly signed and acknowledged by
 “ them in this deponent's presence; and that they the said
 “ C. D. and E. his wife, and F. G. and H. his wife, and
 “ also J. K. and L. M. gentlemen, the commissioners
 “ taking

" taking the same fine, were, at the time of the making thereof, of full age," &c. (as in the former).

If there be only one conusor and his wife, say—and each of them doth.

This rule of Hilary term, 17 Geo. 2. having answered many but not all the good purposes for which it was intended, in order to make the same more effectual and complete, and the better to ascertain the practice for the future, the following rule was made by the court.

" Hilary Term, 26 and 27 Geo. 2. 1753.

" Whereas by a rule of this court, made in Hilary term
 " in the 17th year of the reign of his present majesty, it was
 " ordered, that from and after the first day of the then next
 " Michaelmas term, instead of an oath made *viva voce* of
 " the due acknowledgment of fines, an affidavit or affidavits
 " in writing on parchment should be made and annexed to
 " every fine so taken as aforesaid, in which affidavit or
 " affidavits the person or persons making the same should
 " swear, that he or they knew the party or parties acknow-
 " ledging such fine; that the same was duly signed and ac-
 " knowledged; that the party or parties acknowledging, and
 " also the commissioners taking the same, were all of full
 " age and competent understanding; that the *feme covert*s
 " (if any) were solely and separately examined apart from
 " their husbands, and freely and voluntarily consented to
 " and acknowledged the same; and that the conusor or
 " conusors, and every of them, knew the same to be a fine
 " to pass his, her, or their estate or estates; which fine,
 " together with such affidavit or affidavits annexed, should
 " be transmitted to the lord chief justice, or some other
 " justice of this court, for his *allocatur* thereon, and such
 " affidavit or affidavits should remain annexed to such fine,
 " and be left with the same in the proper office: which rule
 " has been found by experience to have answered many,
 " but not all the good purposes for which it was intended.
 " To make therefore the same more effectual and complete,
 " and the better to ascertain the practice for the future,
 " It is ordered by this court, that from and after the first
 " day of next Michaelmas term, in the affidavit or affidavits
 " made in pursuance of such rule, the person or persons so
 " making the same shall not only swear as they are directed
 " by the said rule, but also that the fine was duly signed
 " and acknowledged upon the day and year, or days and
 " years, mentioned in the caption; and if there be any
 " rature or interlineation in the body or caption of such
 " fine,

" fine, that such razure or interlineation was made before
 " the party or parties signed the fine, and before the caption
 " was signed by the commissioners, which affidavit or affi-
 " davits shall be annexed to the fine, and shall be transmitted
 " to the said lord chief justice, or some other justice of this
 " court, for his *allocatur* thereon, and shall remain annexed
 " to such fine, and be left with the same in the proper
 " office, as is directed by the said rule.

" By the Court."

An Addition to be made to the former Affidavit.

" And this deponent further saith, that the said fine was
 " duly signed and acknowledged upon the day and year
 " mentioned in the caption, (or upon the several days and
 " year or years respectively mentioned in the captions, if
 " there happen to be more captions than one,) and that the
 " razure or interlineation (razures or interlineations) in the
 " body (or in the caption or captions) of such fine (as the
 " case shall happen) was (or were) made before the party
 " (or parties) signed the said fine, and before the caption
 " (or captions) was (or were) signed by the commissioners."

4. *Of acknowledging a Fine before a Judge on the Circuit.*

Ingross *præcipe* and *concord* on parchment, take copy thereof on paper, go with the *conusors* to the judge, who will take acknowledgment, and return you the *ingrossed* *præcipe* and *concord*; pay 13 s. When judge comes to town, get *dedimus* of *curfitor* directed to such judge, which carry to his chambers, and his clerk will *certify* thereon the caption; pay 1s. 6d; then get writ of covenant, and proceed as hereafter mentioned.

Of the different Offices through which a Fine must pass.

The writ of covenant being obtained, and the concord made, ingrossed, and properly acknowledged, in order to complete the fine, they must pass through the several following offices for the respective purposes hereafter mentioned, viz. the *Alienation Office*, the *Return Office*, the *Warrant of Attorney Office*, the *Custos Brevium Office*, the *King's Silver Office*, and the *Chirographer's Office*.

Alienation Office.

It has been observed, that upon the taking out of the original, a fine, called the *premier* or *pre-fine*, is to be paid, which is *pro licentia alienandi*, i. e. for the king's leave to alien the

the lands about to be conveyed; which fine is not actually paid till this time. Take writ, *præcipe*, and *concord* to the *Alienation Office* for this purpose, which is called getting the writ *compounded*, there being certain persons appointed to settle and *compound* these fines.

Formerly nothing more was done at this office; but now, by stat. 32 Geo. 2. c. 14. the other fine, called the *post fine*, or *king's silver*, which is *pro licentia concordandi* (as above mentioned), is also to be paid here; it is always as much, and half as much more, as the *pre-fine*.

For further information on this head, see the above statute.

Return Office.

Then take writ, *præcipe*, and *concord* to the *Return Office*, now kept at the *Prothonotary's*, to get the writ *returned*; the return of the sheriff will be indorsed thereon, which is, as in other *real actions*, nothing more than the fictitious names of the *pledges to prosecute*, and of the *summoners*; pay 1 s. 6d.

From the return-day of the writ, the *post-fine* having been paid, the fine begins to *operate*.

Warrant of Attorney Office.

Make out warrant of attorney as follows: "Norfolk. A. B. "*(the conusee)* puts in his place C. D. his attorney, to prosecute a writ of covenant against E. F. and G. his wife, *(the conusors,*) of lands and tenements in S:" file it with *clerk of warrants*; he will stamp the writ of covenant, and will also keep a *note* of the writ of covenant.

The form of the note is as follows, agreeable to rule of court, Hil. 14 Jac. 1.:

"Norfolk, ff. A. B. *pro. lo. suf. C. D. ad prosequend. bre'*
"de con' *versus* E. F. *de maner' de Dale, cum pertinen' ac de ten'*
"in Sale," &c.

Custos Brevium Office.

Go to *custos brevium*, who will indorse on *concord* the term of which fine was proclaimed, and will also stamp writ and *concord*.

Then apply to *curfitor* to mark on writ the sum paid for the *pre-fine*, *PRO licentia concordandi*, which is called getting the writ *pro'd*.

King's Silver Office.

After which carry writ, *præcipe*, and *concord*, to *King's Silver Office*, where, since the *post-fine*, or *king's silver*, which used to be paid here, is now paid at *Alienation Office* as above mentioned,

mentioned, nothing is done but merely stamping the writ and concord, and an entry taken of the fine, to be kept there.

☞ Sometimes fines, as upon mortgages, are carried no further than this office, and are recorded here.

Chirographer's Office.

The last office is the *Chirographer's*, to which *writ*, *præcipe*, *dedimus* (if any), and *concord* must be taken, and the proper clerk for the county in which the lands lie will make out the *indentures of fine*; call for the same a few days after, pay 3s. 6d. or more, according to the number of warranties.

The fine is then *completed*, for it becomes *ingrossed on record*, which, it may be remembered, was the *last* thing necessary to be done, according to the description above given. The record of the fine, which remains in the possession of the *chirographer*, is deemed the *principale recordum*, and always considered the true record.

The *chirograph* of a fine is good evidence thereof.

☞ The fine, if it be insisted upon, may be detained two days in each of the respective offices above mentioned, (except Warrant of Attorney's Office,) whereby not only great delay would be occasioned, but if near the end of term, *post terminus*, and other *extra* fees, would become chargeable; but by paying the different clerks the trifling gratuity of 6d. for expedition, the fine may be carried through all the offices in one day.

N. B. If the lands lie in *different* counties, there need be only *one* dedimus, which may be had of the cursitor of either county, and also only *one* concord, but there must be *several* writs of covenant.

Of the Proclamations.

The last step proper to be taken in order to complete the fine according to the statute, which is the safest way to do for the reasons before given, is to get the *proclamations* duly made and indorsed thereon.

Fines are to be proclaimed, during term, at the time the court is sitting, *four* times; once in the term wherein they are ingrossed, and once in each of the three subsequent terms.

Should there be any error in the *proclamations*, the fine will still be a good one as at common law, subject, however, to the inconvenience of the statute of nonclaim above mentioned.

Of

Of the Inrolment of Fines.

By 5 Hen. 4. c. 14. all the proceedings on fines, both previous to, and at the acknowledgment thereof, *should be inrolled of record in the court of Common Pleas*; but by 23 Eliz. c. 3. the whole proceedings *may, upon the request or election of any person, be inrolled.*

☞ The inrolment seems only a further security at the election of the party, in case any accident should happen to the record at the chirographer's.

Thus then, agreeable to the description of a fine above mentioned, we find it to be “an amicable agreement of a fictitious suit, grounded upon a writ of covenant, which agreement must be made with the king's consent and licence, and acknowledged by the parties thereto before the justices of Common Pleas, or others thereunto authorised, and be *ingrossed of record in the same court.*” It may afterwards be proclaimed and inrolled, though it is a good fine without.

Of the Parts of a Fine.

A fine, when completed, consists of five parts: 1. The writ of covenant, or original writ. 2. The *licentia concordandi*. 3. The concord.—All of which we have sufficiently considered. 4. The note, which is only an abstract of the writ and the concord, naming the parties, the parcels, and the agreement. And, 5. The foot, or conclusion, which includes the whole matter, the parties, times, places, and before whom it was acknowledged; of this the indentures or chirograph are made at Chirographer's Office, and delivered to the parties. It begins with *Hac est finalis concordia*, and then recites the whole proceeding at length.

Of stopping a Fine from passing.

In order to stop any fine from passing, enter a caveat at the King's Silver Office, and notice will be given you if such fine should be attempted to be levied.

Of searching for a Fine.

Search for fines at the King's Silver Office, where entries are kept, or at the Chirographer's Office,

Of avoiding Fines.

1st, By *entry*. Any person having right of entry on the lands conveyed, may, by making an *actual* entry thereon within the *limited* time, *avoid* a fine; but it must be an *actual* entry, for confession of *lease*, *entry*, and *ouster*, as in ejectment, will not do. And, by stat. 4 Ann. c. 16. where the fine is levied with *proclamations*, no such entry shall be of avail, unless an *action* shall be commenced thereon *within one year* after the making of such entry, and prosecuted with effect.

2d, By *plea*, as if the parties levying the fine had no estate of freehold in the lands conveyed, then any stranger, (but not a *party* or *privy* to the fine,) having a claim, may avoid the fine, by pleading *partes finis nihil habuerunt tempore levationis finis, sed quidam A. B. cujus statum ipse habet*.

3d, Fines may be set aside and avoided for *fraud*, *deceit*, or *covin*, either by writ of *deceit*, or by application to the court by motion.

Of reversing Fines.

Fines can only be *reversed* by *writ of error*, being deemed judgments given in a court of record. Error may be brought in B. R. any time within *twenty years* after fine levied; but it must be by a *party* or *privy* to the judgment.

The *transcript* of the *note* of the fine is removed into B. R. and thereon errors are *assigned*. If the court think the errors fatal, and that the fine ought to be reversed, a *certiorari* issues to the *chirographer* to certify the *very note* of the fine, which when certified to the court, it is actually cancelled; or a writ may be sent to the treasurer and chamberlains of the Exchequer to take the fine off the file.

As the proceedings in a suit are considered *in fieri* until judgment given (although the record be made up), a fine may be *amended* or *invalidated* at any time *during the term* in which it is levied, by *motion* in court of C. B.

SECTION II.

*Of suffering Recoveries.**The Nature of a Common Recovery.*

A *common recovery* is a judgment obtained in a *fictitious* suit brought against the *tenant of the freehold*, in consequence of a
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default made by the person who is last vouched to warranty in such suit.

But although it be a *fictitious* suit, yet the same forms and mode of proceeding must be observed and adhered to, as if it were an *adversary*, or actual suit. It may be useful, therefore, briefly to consider the ground and principles of such adversary suit.

When a person purchased a freehold estate, the vendor warranted the title to the vendee; if therefore he had in fact no such title in him, and the rightful proprietor of the lands afterwards brought his *real* action against the *tenant* of the freehold for the recovery thereof, such tenant called upon or vouched (from *voco*, to call) the person who made such warranty to him; and if it happened that the vendor had himself bought the lands under similar circumstances, and under a warranty from a third person, he called upon or vouched such *third* person upon his warranty, and so *totius quoties*. The consequence of which was, that the demandant or plaintiff recovered judgment against the *tenant*, and the tenant had judgment against the *vouchee*, to recover lands of equal value in recompence of the lands so warranted by him.

Such also is the principle of a *common recovery*, the only difference being, that the last vouchee, or person called upon, who is always a *nominal* person, as the *crier of the court*, or the like, and is denominated the *common vouchee*, upon being vouched pleads, and then makes default; upon whose default, judgment is recovered by the demandant against the tenant, who is *supposed* to have his recompence from the vouchee; which recompence, although merely *nominal*, is the chief corner-stone of this artificial structure, a *common recovery*; for it is allowed, that the reason of the original determination of the judges in favour of a common recovery being a good bar to an estate-tail, was because the issue in tail had a *recompence* in value, either real or fictitious, for the estate-tail which was recovered.

Of the Force and Effect of a Common Recovery.

Common recoveries operate as an absolute bar not only of all estates-tail, but of *remainders* and *reversions* expectant on the determination of such estates; whereas it may be remembered, that a fine only barred an estate-tail, and not the remainders or reversions.

So a common recovery bars all *contingent* remainders; but not an *executory devise*, unless the person to whom the executory devise is given comes in as a vouchee. But the operation of a common recovery is governed by the number of persons

persons vouched in the suit, for it may be suffered with a *single*, *double*, or *treble* voucher, or even with a greater number.

If suffered with a *single* voucher, (*i. e.*) where the *præcipe* is brought against the tenant in tail himself, who immediately vouches over the common vouchee, it is a good bar to the estate, whereof the tenant in tail is in *possession* at the time of the recovery, but not to any other estate.

If suffered with a *double* voucher, (*i. e.*) where the *præcipe* is brought against some other person, and the tenant in tail is vouched, who then vouches the common vouchee, it is not only a bar to the estate whereof he is then in *possession*, but also to all other estates to which he has any *right*, although such estates be divested out of him, and discontinued.

If suffered with a *treble* voucher, it is a perpetual bar to the estate whereof the tenant to the *præcipe* was seised, and of every other estate which has ever been in the first or second vouchee, or their ancestors, and of all *remainders and reversions, and charges and incumbrances* thereon.

Of the Essentials to a Common Recovery.

It has been before observed, that the same formal precision is necessary in suffering a common recovery, though a fictitious action, as if it were an adversary suit. There are *five* things therefore *essential* to the validity of a common recovery. 1st, *A proper original writ.* 2d, *A good tenant to the præcipe.* 3d, *The vouching by the tenant.* 4th, *The judgment.* 5th, *The execution thereof.* Of each briefly in their order.

1st, Of the Original Writ.

Upon any writ whereby lands are demandable, a common recovery may be suffered, but the usual one is a writ of entry *sur disseisin in le poſt.*

This writ was given by the stat. of *Marl.* 52 Hen. 3. c. 30.; for at the common law no person dispossessed of his lands was entitled to recover them by this *possessory* action of a writ of entry, after more than *two alienations or descents* had passed.

If *one* alienation or descent only had taken place, the writ of entry was in the *per* (as it is called), because it stated, that the tenant had not entry but by A. B., *nisi PER A. B. qui se in illud intrusit et illud tenenti dimisit.*

If *two* alienations or descents had passed, it was in the *per* and *cui*, stating, that the tenant had not entry but by C. D., *to whom* A. B., who was the original wrong-doer, demised it, *nisi PER C. D., CUI A. B. illud dimisit qui se in illud intrusit.*

And these were the only writs of entry at common law, the demandant after *two* degrees, i. e. two alienations or descents, being driven to his writ of *right*.

But the writ of entry in the *post* is of a more general and comprehensive nature, avoiding any deduction of title from the original intruder to the tenant, and merely alleging, that the tenant had not entry unless *after* or subsequent to the ouster or intrusion made by the original wrong-doer, *nisi post intrusionem quam A. B. in illud fecit*. Nor indeed can any thing more be requisite, since, if the original title be bad, so of course must be the derivative title.

2d, Of the Tenant to the Præcipe.

All real actions for the recovery of land must be brought against the person *actually in possession of the freehold*, otherwise they would be ineffectual, since no seisin could be had.

Likewise in *common recoveries*, it is absolutely requisite that the tenant to the *præcipe* (so called from the writ or *præcipe quod reddat* being brought against him) should be *actually seised of the freehold* which is about to be conveyed.

This may, and usually is done by the tenant in tail executing a deed or passing a fine, for the *express* purpose of making the person therein named *tenant to the præcipe*.

Much reading is to be found in the books, and great nicety seems to have been required, both as to the time and manner of conveying a legal freehold to make a good tenant to the *præcipe*.

But this is now regulated, and the doubts formerly entertained in a great measure cleared up by the stat. 14 Geo. 2. c. 20. which enacts, that "all recoveries shall be valid, notwithstanding the fine or deed making the tenant to the *præcipe* should be levied or executed after judgment obtained and writ of *seisin* awarded, provided the same appear to be levied or executed before the end of the term in which such recovery was suffered." And also, that "although the recovery itself do not appear to be entered, or be not regularly entered on record, yet the deed to make a tenant to the *præcipe*, and declare the uses of the recovery, shall, after a possession of *twenty* years, be sufficient evidence, on behalf of a purchaser for valuable consideration, that such recovery was duly suffered."

3d, Of the Vouching.

The tenant to the *præcipe*, when counted or declared against, may *vouch*, or call upon another person who is supposed to have warranted the title to him at the original purchase.

chafe, since it is by the default of the last vouchee, that the judgment or recovery is obtained.

There are *single, double, or treble* vouchers, as the case may require; and the recovery, when suffered, operates accordingly in manner above mentioned.

4th, *Of the Judgment.*

The entry of the judgment is: "Therefore it is considered, that the aforesaid I. S. do recover the seisin against the said W. B. of the tenements aforesaid, with the appurtenances, and that the said W. B. have of the lands of the aforesaid G. R. to the value," &c.

Judgment must not be given before the return of the writ of *entry* or *summons*.

If any of the parties, demandant, tenant, or any of the vouchees, *die* before judgment, the recovery is void.

5th, *The Execution.*

Demandant having obtained judgment, a writ of *habere facias seisinam* is awarded to give him possession. The time when the writ should be tested and made returnable, is mentioned hereafter.

Thus is the mode of proceeding from the commencement of the suit to judgment and execution, strictly adhered to in the *fiction* suit, whereon a common recovery is founded, as if it were an *actual* real action. The judgment then remains upon record; and the claim or title of the demandant being thus solemnly ratified and confirmed, a *common recovery* becomes a settled and safe assurance or conveyance.

We shall conclude with briefly considering the mere *practical* part of the *mode of suffering a common recovery*.

How to suffer Recoveries.

There are two ways of suffering recoveries. 1st, *By a personal appearance of the parties in court.* 2d, *By their appearance by attorney.* The former is the easiest and cheapest, but from certain circumstances, as distance of residence, sickness, or the like, the latter may be sometimes the most convenient.

1st, *Where the Parties personally appear in Court.*

By the *parties*, are *here* properly meant the *tenant* and *vouchees*, for the *demandant* never need appear in court.

Of the Præcipe.

Make out *præcipe* for writ of entry, naming therein the *demandant* and *tenant*, the parcels, and the places where they lie; also the names of the different *vouches*, and whether they appear and vouch in person or by attorney. It is the practice, however, not to get writ of entry immediately thereon, (though in point of regularity it still might, and perhaps ought to be done,) but first to pass the recovery at the bar.

The form of the *præcipe*, if with a single voucher, is as follows :

“ Devonshire, to wit. Command C. F. that justly, &c.
 “ he render to W. M. esq. four messuages, four gardens,
 “ forty acres of land, fifty acres of meadow, fourteen acres
 “ of pasture, twenty acres of willows, two hundred acres of
 “ furze and heath, and common of pasture for all manner
 “ of cattle, with the appurtenances in L. and O., and also the
 “ rectory of O. with the appurtenances, and also all and all
 “ manner of tithes, oblations, obventions, and emoluments
 “ to the said rectory belonging or appertaining, which he
 “ claims, &c.

“ Tenant in person vouches to

“ warranty Thomas Francis

“ Martin (a).”

The same form of *præcipe* is to be observed if it be with double, treble, or any other number of vouchers, only repeating the names of the persons who vouch each other, and always making Thomas Francis Martin the last person vouch- ed, as follows, supposing it to be a treble voucher :

“ Tenant in person vouches to

“ warranty A. B., who in

“ person vouches C. D., who

“ also in person vouches

“ Thomas Francis Martin.”

Of passing Recovery at the Bar.

Attend with the tenant and vouchers at Westminster; take with you your *præcipe*, which give to a serjeant or his clerk. Serjeant, with other serjeants, will count thereon, and sign the same. Prothonotary will enter *præcipe* in his book kept for that purpose, and will write on *præcipe*, that the appearance of the tenant, or of the tenant and vouchers, is or are recorded by the

(a) Thomas Francis Martin is bag-bearer to the Custos Brevium, who is always the common voucher.

court.

court. It will then be returned to you. The number of serjeants to count depends upon the number of vouchees, there being one serjeant to the *demandant*, another to the *tenant*, and another to each *vouchee*.

The *count* itself is little more than a repetition of the *writ of entry* against the tenant; to this count the serjeant for tenant answers, that the tenant is present there, and *vouches* to warranty A. B. The serjeant for A. B. then asserts, that A. B. is present, and prays the *demandant* to *count* against him; upon which the same count, *mutatis mutandis*, is repeated. A. B. then *vouches* to warranty C. D., and so on through all the *vouchees*, against each of whom a similar count to the first is used, until at length the *last vouchee* (which is the *common vouchee*) appears and pleads thereto; upon this the *demandant* prays leave to *imparle*, which being granted, common *vouchee* does not afterwards *appear*, whereon judgment of default is obtained; all of which several counts, vouchers, plea, and imparlance, in their order, are now set forth in the entry of the recovery on the plea roll.

In ordinary cases the serjeants do not *count* in full form, but when a nobleman appears to suffer a recovery, they do; and in all cases the same form is preserved in the entry of the recovery as if they did. The precise nature of this counting, therefore, may be seen by the form of the entry of recovery, which *vide post*.

Of the Writ of Entry.

Having *passed* the recovery at bar, take copy of *præcipe*, and carry it to *curfitor*, who will make out the *writ of entry*, which is a writ of entry *sur disseisin in le post*, as above mentioned. The writ of entry must then be carried to *Alienation Office* to be compounded: you must then get attorney-general's hand to it, and carry it to *Return Office*, now kept at the *Protobonotary's Office*, to be returned in the same manner as the writ of covenant is compounded and returned in passing a fine.

The form of the writ of entry is as follows:

" GEORGE the Third, by the grace of God, &c. To the Sheriff of Norfolk, greeting: Command A. B. that justly and without delay he render to C. D. esq. twenty acres of land (*here recite parcels*) with the appurtenances in G., which he claimeth to be his right and inheritance, and into which the said A. hath not entry but after the disseisin, which Hugh Hunt thereof unjustly and without judgment made to the said C. within thirty years now last past, as he saith, and whereof he complaineth that the aforesaid A. de-

“ forced him; and unless he shall do it, and the said C. shall
 “ secure you for prosecuting his complaint, then summon
 “ by good summons the aforesaid A. that he be before our
 “ justices at Westminster on the morrow of All-Souls to
 “ shew wherefore he will not do it, and have you there the
 “ summoners and this writ. Witness ourself at Westminster,
 “ the 10th day of October in the 38th year of our
 “ reign.”

The return is in this manner—

“ Pledges of prosecuting, { John Doe.
 { Richard Roc.
 “ Summoners, { John Denn.
 { Richard Fenn.
 “ L. M. Esq. Sheriff.”

Of the Writ of Seisin.

Before writ of entry is returned, you may prepare writ of *seisin*, which is to be signed by prothonotary, and sealed; then carry writ of *seisin*, together with writ of entry, to the *Return Office*, to be returned; but it is usual, for the sake of expedition, to indorse the return of the *seisin* on the writ before you carry it to *Return Office*.

The day of executing the writ, by giving *seisin*, as indorsed thereon, may be any day within a reasonable time after its teste, and before the return.

The writ of *seisin* should bear *teste* the fourth day inclusive after the return of the writ of *entry*, or last writ of *summons* (when *summons* is necessary, which see *post*, tit. *Summons*); and there should be 15 days between the *teste* and *return*.

If the writ of entry or last writ of *summons* (when you proceed by *summons*) is returnable too late in the term, that you cannot make your writ of *seisin* returnable in that term, then you make it returnable *indilate*, without delay.

If they be returnable the last return of a term, then the writ of *seisin* must be returnable the first return of next term, unless the next term be Trinity term, and then it must be returnable on the second return of that term, because there are not 15 days between the last day of Easter term and the morrow of the Holy Trinity. When the writ of *seisin* is signed and sealed, it is carried to *Return Office*, and got returned as above mentioned, together with writ of entry.

The form of writ of *seisin* is as follows:

“ GEORGE the Third, by the grace of God, &c. To the
 “ Sheriff of *Norfolk*, greeting: Know ye that C. D. esq. in
 “ our

" our court before our justices at Westminster, has recovered his seisin against A. B. gent. of S. twenty acres of land (*parcels*) with the appurtenances in G. by our writ of entry *sur disseisin in le post* : and therefore we command you, that without delay you cause full seisin of the tenements aforesaid with the appurtenances to be delivered to the said C.; and in what manner you shall have executed this our precept, you make to appear to our justices at Westminster on the octave of St. Hilary; and have you there this writ. Witness Sir James Eyre, knight, at Westminster, the 28th day of November in the 38th year of our reign."

The return is as follows:

" By virtue of this writ to me directed on the 10th day (a) of December in the year within written, I caused full seisin of the tenements within specified, with the appurtenances, to be delivered to the within-named C. as I am within commanded.

" L. M. Esq. Sheriff."

Of the Entry of Recovery.

Immediately after the writ of *entry* is obtained, and during the time that the writs of *entry* and *seisin* are being passed, make out the *draft* of the recovery.

Get plea roll of *prothonotary*, and enter it thereon. It is advisable before ingrossing recovery on the plea roll for prothonotary or his clerk to peruse it, to avoid mistakes.

For the better understanding the nature of this entry, and also the mode of *counting* as above mentioned, the following is the form of an entry of a recovery with double voucher, which will answer the purpose where there are more vouchers, as it is only adding as many counts as there are persons who vouch, and at last ending with vouching the common vouchee, and his making default, &c. as follows:

" Berkshire, to wit. Thomas White, gent. in his proper person demandeth against William Jackson, Gent. two messuages, two tofts, one fulling-mill, two dove-houses, two gardens, one hundred acres of land, thirty acres of meadow, two hundred acres of pasture, five acres of salt marsh, twenty acres of fresh marsh, seventy shillings rent, and common of pasture for all manner of cattle, with the appurtenances in L. and O., and also the advowson of the

The ingrossment is to be on a roll of that term wherein writ of entry is returnable, and the very words of the writ of entry must be pursued.

(a) Any day, not being Sunday, at a reasonable distance of time from the date of writ, and before the return thereof—ten days sufficient.

" parochial

“ parochial church of O. as his right and inheritance, and
 “ into which the same William hath not entry, but after the
 “ disseisin which Hugh Hunt thereof unjustly and without
 “ judgment hath made to the said Thomas, within thirty
 “ years (a), &c.; and whereupon he saith, that he was seised
 “ of the tenements, rent, and common aforesaid, with the
 “ appurtenances, in his demesne, as of fee and right, and of
 “ the advowson aforesaid, as of fee and right, in time of
 “ peace (b), in the time of our lord the king that now is,
 “ by taking the profits thereof to the value, &c. and in
 “ which, &c. and thereof he bringeth suit, &c.

“ And the said William in his proper person cometh and
 “ defendeth his right, when, &c. and thereupon vouches to
 “ warranty Roger Blgrave, esq. who is present here in
 “ court in his proper person, and freely warranteth to him
 “ the tenements, rent, and common aforesaid, with the ap-
 “ purtenances, and the advowson aforesaid, &c.; and here-
 “ upon the said Thomas demandeth against the said Roger,
 “ tenant by his own warranty, the tenements, rent, and com-
 “ mon aforesaid, with the appurtenances, and the advowson
 “ aforesaid, in manner aforesaid: and whereupon he saith,
 “ that he was seised of the tenements, rent, and common
 “ aforesaid, with the appurtenances, in his demesne as of fee
 “ and right, and of the advowson aforesaid as of fee and
 “ right, in time of peace, in the time of our lord the king
 “ that now is, by taking the profits thereof to the value, &c.
 “ and into which, &c. and thereof he brought suit, &c.

“ And the said Roger, tenant by his own warranty, defends
 “ his right, when, &c. and thereupon further voucheth to
 “ warranty Thomas Francis Martin, who is present here
 “ in court in his proper person, and freely warranteth to him
 “ the tenements, rent, and common aforesaid, with the ap-
 “ purtenances, and the advowson aforesaid, &c.; and here-
 “ upon the said Thomas demandeth against him the said
 “ Thomas Francis, tenant by his own warranty, the tene-
 “ ments, rent, and common aforesaid, with the appurte-
 “ nances, and the advowson aforesaid, in manner aforesaid,
 “ &c.: and whereupon he saith, that he was seised of the
 “ tenements, rent, and common aforesaid, with the appurte-
 “ nances, in his demesne as of fee and right, and of the ad-
 “ vowson aforesaid as of fee and right, in time of peace, in

(a) No person shall sue, have, or maintain any action for any lands, &c. of or upon his own seisin or possession therein, above 30 years next before the teste of the original of the same writ hereafter to be brought. Stat. 32 H. 8. c. 2. s. 3.

(b) In all real actions the esplees, or taking of the profits, are laid *tempore pacis*, for if they were taken *tempore belli*, they are not accounted of in law. 1 Inst. 249. b.

" the time of our lord the king that now is, by taking the profits thereof to the value, &c. and into which, &c. and thereupon he bringeth suit, &c.

" And the aforesaid Thomas Francis, tenant by his own warranty, defendeth his right, when, &c. and saith, that the said Hugh did not disseise the said Thomas White of the tenements, rent, and common aforesaid, with the appurtenances, and of the advowson aforesaid, as the said Thomas by his said writ and declaration above doth suppose; and of this he puts himself upon the country, &c.

" And the said Thomas White thereupon craveth leave to imparle, and he hath it, &c.; and afterwards the said Thomas cometh again herein to court, in this same term, in his proper person, and the said Thomas Francis, although solemnly called, cometh not again, but departed in contempt of the court, and maketh default: therefore it is considered, that the said Thomas White do recover his seisin against the said William of the tenements, rent, and common aforesaid, with the appurtenances, and of the advowson aforesaid, and that the said William have of the land of the aforesaid Roger to the value, &c. and that the said Roger have over of the land of the said Thomas Francis to the value, &c.; and that the said Thomas Francis in mercy*, &c.: and hereupon the said Thomas White prays the writ of the lord the king to be directed to the sheriff of the county aforesaid, to cause full seisin of the tenements, rent, and common aforesaid, with the appurtenances, and of the advowson aforesaid, to be delivered to him, and it is granted to him returnable here from the day of St. Martin in fifteen days, &c. (a), at which day the said Thomas White cometh here into court in his proper person; and the sheriff, namely, Sir A. B. knight, now returneth, that he, by virtue of the aforesaid writ to him directed on the 23d day (b) of November last past, did cause full seisin of the tenements, rent, and common aforesaid, with the appurtenances, and of the advowson aforesaid, to be delivered to the aforesaid Thomas White, as by the said writ he was commanded," &c.

* This word must be written in the margin of the roll.

Of exemplifying Recovery.

The recovery is then to be *exemplified*, which is done by ingrossing same on double 5s. stamp parchment.

(a) When the writ of seisin is returned *indilate*, without delay, you say afterwards, *that is to say, the day of* (the last day of the term, unless Sunday) *in the same term the said Thomas cometh here.*

(b) Any day between the teste and return of the writ of seisin, by which a man may be supposed to have rode from Westminster to the place where the land lies,

Of

Of the Nature of Exemplification.

An exemplification is described in *termes de la ley* to be when a man will have any original record written out and exemplified forth of the court where it remains; to which purpose he may have a writ.

Accordingly, the *exemplification* of the *recovery* is a kind of formal acknowledgment tested by the C. J. of C. B. that such a recovery (stating the same) was duly suffered at the time therein mentioned, and is thereby *exemplified* at the desire of the *demandant*.

Of the Form of Exemplification.

It begins thus: "GEORGE the Third, &c. by the grace of God, &c. To all to whom these our present letters shall come, greeting: Know ye, that amongst the pleas of land inrolled at Westminster before Sir James Eyre, knight, and his brethren our justices of the bench, of the term of the Holy Trinity (*the return of the writ of entry*), in the 38th year of our reign, upon the 7th roll it is thus contained (*setting forth the title, and the whole of the entry, as on plea roll: it then concludes as follows*): All and singular which premises, at the request of the said A. (the *demandant*), by the tenor of these presents we have commanded to be exemplified. In testimony whereof we have caused our seal, appointed for sealing of writs in the bench aforesaid, to be affixed to these presents. Witness Sir James Eyre, knight, at Westminster, the 1st day of July in the 38th year of our reign."

The recovery is generally exemplified the same term it is suffered. The exemplification must bear teste some day in term, and after the return of the writ of seisin, unless you shall be obliged to make the writ of seisin returnable in the next term after the recovery suffered (as before observed), in which case you teste the exemplification the last day of the term the recovery was suffered.

When the writ of seisin is returnable in the subsequent term, you cannot enter the sheriff's return of the writ in the body of the exemplification; it would be absurd to make an exemplification of Michaelmas term, and therein to state a matter done in court the Hilary term following; therefore in such case you only enter the award of the writ of seisin as thus, after the words "*in mercy*," &c. "And hereupon the said M. prays the writ of our lord the king to be directed to the sheriff of the county aforesaid, to cause him to have full seisin of, &c. (*the parcels*); and it is granted to him returnable here on the octave of St. Hilary, &c., all and singular which premises, at the request of the said

" M. by

" M. by the tenor of these presents, we have commanded
 " to be exemplified," &c. *as before.*

And then, upon the folding up of the exemplification, you enter the sheriff's return thus: "*At which day* the aforesaid
 " M. (the demandant) comes here in his proper person, and
 " the sheriff, to wit, Sir A. B. knight, now returneth, that he,
 " by virtue of the aforesaid writ to him directed on the
 " day of last past, caused the said M. to have
 " full seisin of, &c. (*the parcels*), as by the said writ he was
 " commanded."

This is sometimes called the indorsing of the *ad quem diem*.

Of examining the Proceedings, docketing the Rolls, and signing and sealing the Exemplification.

Exemplification being completed, carry it with the *roll*, *writs*, and *prcipe* passed at the bar, to *Prothonotary's Office*; enter the *prcipe* on a *remembrance-roll* of the term writ of entry was returnable; which prothonotary's clerk will give you, and shew you how to make *entry* thereof; examine the writs, entries, and exemplifications with the clerk.

The form of the entry of the *prcipe* is as follows:

" Devonshire, to wit. Command A. B. that justly, &c.
 " he render to C. D. twenty messuages, &c. (*the parcels*),
 " which he claimeth, &c. Writ of entry returnable on, &c.
 " Witnessed the day of

" Pledges of prosecuting, { John Doe,
 Richard Roe.

" Summoners, { John Denn,
 Richard Fenn.

" L. M. Esq. Sheriff."

" Tenant in person vouches
 " to warranty E. F., who
 " also vouches G. H., who
 " vouches Thomas Fran-
 " cis Martin."

You then docket the roll on a docket roll of that term in the *Prothonotary's Office* in the manner you will see others docketed.

Entry *in le post*, two Vouchers in person.

" Bedfordshire. E. F. in person, } Roll 50.
 G. H. in person. }

The

The prothonotary will then *sign* the exemplification, and return you the same back with the *præcipe*, but he keeps the writs and rolls; after which get the exemplification *sealed*, and deliver it to your client. The recovery is now perfected.

The prothonotary keeps the writs and rolls in his office for six or eight terms, then takes care to file the former with the *custos brevium*, and the rolls he delivers to the clerk of the warrants, who puts them in bundles in the Common Pleas Treasury at Westminster.

The prothonotaries, when they examine and sign the exemplification, must take care that all the writs, being sealed and duly returned, are left with them to be filed. R. Mich. 29 Car. 2.

And must also take care that the writ of entry be first signed by the attorney-general, otherwise he is not to sign the exemplification. East. 34 Car. 2.

No exemplification must be sealed until signed by the prothonotary. Mich. 1654. And unless the exemplification be of fines and recoveries of *the present or next precedent terms*, it cannot be sealed until signed and examined by the clerk of the Treasury. *Ibid.*

2d, Where the Parties appear by Attorney.

The *demandant* need never appear in person; the only parties therefore for whom *warrants of attorney* can be necessary, are the *tenant* and *vouches*; but as any one may be made *tenant to the præcipe*, the expence of a *dedimus* may be saved, by appointing some friend who lives in London, or who can conveniently attend at Westminster, to pass the recovery.

The mode of appearing by attorney, is by executing *warrants of attorney*, authorising the persons therein named to appear or *vouch* for such *tenant* or *vouches*. As it must be obvious that too great care cannot be taken by the legislature to prevent fraud or covin in the procuring of such warrants of attorney, similar precautions are used as in taking acknowledgments on passing *fines*, which have been before treated of, it being necessary that the parties giving such *warrants of attorney* should *acknowledge* the same before proper persons, who may examine them as to their consent, capacity, and the like.

There should be two attornies appointed by the warrant, and their authority *joint* and *several*, that if one die the other may proceed.

Before whom Warrant of Attorney may be taken.

The warrants may be taken before the chief justice of the Common Pleas, or any judge on the circuit, without any special authority but the usual way is, before commissioners appointed by writ of *dedimus potestatem de attorney faciendo*.

Of acknowledging Warrant of Attorney before a Judge.

If the tenant can attend a judge to acknowledge the warrant of attorney, draw up the *precipe* and warrant of attorney in parchment, as follows:

"Warwickshire, to wit. Command A. B. that justly,
" &c. he render to C. D. the manor of O. &c. (*parcels*),
" which he claims," &c.

"Warwickshire, to wit, A. B. puts in his place E. F.
" and G. H., his attorneys, jointly and severally against C. D.,
" to gain or lose in a plea of land.

" A. B.

" Taken and acknowledged on the
" day of in the 38th
" year of the reign of king George
" the Third, before Sir Giles
" Rooke."

Make a copy of this on paper to leave with the judge. Attend with the tenant on a judge, who will take the consufance and sign it. The parchment, *precipe*, and warrant being signed, bring them away; leave the paper copy with judge's clerk.

Then get recovery passed at bar, and proceed as before directed.

The only difference in the entry on the plea-roll is, that instead of saying,

"And the aforesaid A. B. in his proper person comes and defends," &c. ; you say, "*And the aforesaid A. B. by E. F. his attorney comes and defends.*"

Of acknowledging Warrant of Attorney for the Tenant before Commissioners.

If the tenant cannot attend a judge to acknowledge the warrant of attorney, you must sue out a *dedimus potestatem* to take the warrant of attorney of the tenant.

This writ is not grounded on the statute of Carlisle, as we have before hinted the *dedimus* to take consufance of *finis* to be, that

Before

that statute only extending to *finer*; but it is a writ at *common law*, whereby persons disabled from personally appearing in court might nominate attorneys in their stead.

How to sue out and proceed on *Dedimus*.

Make *præcipe* for curfitor in form below, mentioning only the name of the *commissioners* you would wish to be inserted in the *dedimus*. Having got writ from curfitor, send it to your client in the country; any *two* of the *commissioners* may take the *acknowledgment* of the warrant of attorney, which you ought to have written on parchment, together with a copy of the *præcipe*. When acknowledgment is taken, annex the warrant to *ded. po.* and indorse thereon, "*The execution of this writ appears in a certain schedule herunto annexed;*" which indorsement *commissioners* should sign.

The *ded. po.* being returned with warrant of attorney, take copy of *præcipe*; carry it with *ded. po.* &c. to a serjeant in court, who will get same passed.

By a rule of court, 14 Geo. 3. an *affidavit* must be annexed to the copy of the *præcipe* and the warrant of attorney, at the time of passing such recovery, as to the due execution of the writ of *dedimus*; which *affidavit* must be made by some attorney, and must allege that *he knew the parties acknowledging the warrant; that the same was duly signed at the time mentioned in the caption; that the parties were of full age and competent understanding; that the femmes coverts (if any) were separately examined, and voluntarily acknowledged same; that the parties knew the intent of such warrant, and that the razures or interlineations (if any) were made before the parties, and before the commissioners signed same; which affidavit, together with the copy of the præcipe and warrant of attorney, are afterwards to be filed in the office of inrolment of writs for fines and recoveries.*

Of the Writ of Entry, Mittimus, and Transcript.

Then take *dedimus* and warrant of attorney to curfitor, who will make out writ of entry, mittimus, and transcript; after which get writ of entry compounded at Alienation Office, or you may get the transcript and mittimus made out before you pass them at bar.

The form of the *præcipe* for the curfitor is as follows:

" Kent, to wit. Command A. B. gent. that justly, &c.
" he render to C. D. gent. two messuages (*parcels*), which
" he claims," &c.

" *Dedimus*

“ *Dedimus* directed to { Sir Thomas King, knt.
John Nokes.
Joseph Fry.
Robert Strong.
Jacob Marth.”

One of the commissioners should always be a knight; but if you name four others, the cursitors insert a knight of course, though he seldom attend the consufance.

In this case the entry of the recovery differs from ordinary cases, as the mittimus and transcript are to be entered on the roll *verbatim* in the following form:

“ Our lord the king sent to his justices of the bench here his writ of mittimus, closed together with the tenor of a certain writ of our said lord the king of *dedimus potestatem*, for receiving a warrant of attorney, and the return of the same writ, as also the warrant of attornies thereupon received in these words:—George the Third, by the grace of God, of *Great Britain, France, and Ireland*, king, defender of the faith, &c. To his justices of the bench, greeting: The tenors of our certain writ of *dedimus potestatem*, directed to our trusty and well-beloved Sir Thomas King, knt. and to our beloved A. B., C. D., (*naming commissioners*,) gentlemen, for and concerning the receiving such attorney or attornies, jointly or severally, as William Spencer, gent. would put or constitute in his stead before the said Sir William, (*naming commissioners*,) or two of them, to gain or lose against Thomas Spencer, gent. in a plea of and upon our writ of entry *sur disseisin in le post* depending before you, between the aforesaid Thomas S. and William S., of two messuages (*here describe parcels as in dedimus*), and the return of our said writ of *dedimus potestatem*, and also the warrants of attorney in that behalf received, sent into our Chancery, and remaining on the files of the same Chancery, we send to you inclosed in these presents, commanding you that the tenors aforesaid being inspected, you cause further to be done therein, at the prosecution of the said Thomas Spencer, what of right and according to the law and custom of England, shall be meet to be done. Witness ourself at Westminster, the 11th day of May in the 38th year of our reign.”—“George the Third, by the grace of God, of *Great Britain, France, and Ireland*, king, defender of the faith, &c. To his trusty and well-beloved Sir William King, knt. and to his beloved (*naming commissioners*), gentlemen, greeting: Whereas our writ of entry *sur disseisin in le post* dependeth before our justices of the bench, between Thomas Spencer, gent. and William

Form of entry where the tenant appears by attorney on a warrant acknowledged before commissioners by *dedimus potestatem* with entry of mittimus and transcript.

“ Spencer, gent., of two messuages (*here describe parcels*),
 “ and the said William Spencer being, as we are informed,
 “ so infirm that he is not able, without great danger of his
 “ body, to travel to Westminster at the day in the said writ
 “ contained, to do and act those things which then and
 “ there would be expedient to be done in the same, we,
 “ tendering the state of the said William in this behalf,
 “ have given to you, or two of you, power and authority
 “ of receiving such attorney or attornies, jointly or severally,
 “ as the said William will put or constitute in his stead
 “ before you, or two of you, to gain or lose in the said plea
 “ before our said justices; and therefore we command you,
 “ or two of you, that going in person to the said William,
 “ if he be not able conveniently to come to you, you receive
 “ his attorney or attornies, jointly or severally, in form afore-
 “ said, and when you shall have received the said attorney
 “ or attornies, you distinctly and plainly, without delay,
 “ certify us in our Chancery of the name or names of such
 “ attorney or attornies under your seals, or the seals of two
 “ of you, sending back to us this writ. Witness ourself at
 “ Westminster, the 3d day of May, in the 38th year of our
 “ reign.—By the lord chancellor of Great Britain, at the
 “ instance of the demandant, Giles Rooke.—The execution
 “ of this writ appears in a schedule hereunto annexed.
 “ Thomas King, John Nokes. Received 6s. 8d.”—
 “ Kent, to wit. William Spencer, gent. puts in his place
 “ Richard Smith and James Dean, his attornies, jointly and
 “ severally, against Thomas Spencer, gent. to gain or lose in
 “ a plea of land. *William Spencer*. Taken and acknow-
 “ ledged the 7th day of May in the 38th year of the reign
 “ of king George the Third, at the city of Canterbury,
 “ before us, Thomas King, John Nokes.”

Here leave a distance of about an inch, and then enter the counts, &c. as in the ordinary way.

“ Kent, to wit. Thomas Spencer, gent. in his proper
 “ person demandeth against William Spencer,” &c. Only
 take care and say, “ And the aforesaid William, by *Richard
 Smith his attorney*, comes and defends.” In other respects
 the entry from this place is as if there had been no *dedimus*.

Of the Tenant and Vouchee appearing by Attorney and acknowledging the Warrant before a Judge.

The above is the mode of proceeding when only the tenant appears by attorney, whether the warrant of attorney be acknowledged by him before a judge or before commissioners;

but it often happens that the *vouchee* appears by attorney, and this also may be either by his acknowledging the warrant of attorney before a judge, or before commissioners by *dedimus*; and sometimes both tenant and vouchée appear by attorney. In all these cases the same distinction in the practice holds; namely, whether they go before a judge to acknowledge the warrant of attorney, or attend before commissioners.

In the first case, if the tenant and vouchée can attend a judge to acknowledge the warrants, draw up the *precipe* and warrants in parchment; the *precipe* is the same as mentioned before, p. 495. so is the warrant for the tenant. The warrant for the vouchée is thus:

“ Kent, to wit. J. K. whom A. B. voucheth to warranty, puts in his place L. M. and N. O. his attorneys, jointly and severally, against C. D., to gain or lose in a plea of land, &c.

“ Taken and acknowledged the day
“ of in the 38th year of the reign
“ of king George the Third, before
“ Sir Giles Rooke.”

Go with it before a judge to get it acknowledged, and proceed to get writ of entry, &c. as above directed.

Of the Writ of Summons.

If the person whom the tenant vouches is not in court, then a writ called a *writ of summonas ad warrantizandum* issues to compel the person called upon to appear in court and warrant the lands.

Where the vouchée appears by attorney, the warrant by which he constitutes an attorney ought strictly to bear date after the *teste* of the writ of summons, but the omission of this circumstance will not invalidate a recovery.

By the common law this writ of summons had nine returns. By the stat. 16 Car. 2. c. 16. f. 10. they are abridged to five. Now, by stat. 24 Geo. 2. c. 48. f. 8. they are reduced to four inclusive. As, if the writ of entry is returnable on the morrow of All Souls, then the writ of summons must be returnable from the day of St. Martin in 15 days, being the fourth and last return of Michaelmas term. And if there are three vouchers, the writ of summons for the second vouchée is to be returnable four returns (both inclusive) from the return of the summons of the first vouchée, and writs of summons are tested four days inclusive from the writ of entry, supposing the fourth day to be *dies juridicus*, and a day in term.

The form of the writ of summons is as follows :

“ *GEORGE* the Third, by the grace of God, of *Great Britain, France, and Ireland*, king, defender of the faith, &c. To the sheriff of Kent, greeting: Summon by good summoners F. G. that he be before our justices at Westminster, from the day of Easter in five weeks, to warrant to A. B. three messuages (*parcels*), which C. D., in our court before our justices at Westminster, claims as his right against the said A. B. by our writ of entry *sur disseisin in le poft*. And whereupon the said A. B. in our said court hath vouched the aforesaid F. G. to be summoned in your county to warrant against the said C.; and have you there the summoners and this writ. Witness Sir James Eyre, knt. at Westminster the day of in the 38th year of our reign.”

————— (Prothonotary).

Get this writ signed by one of the prothonotaries and then sealed.

Make out the writ of seisin as before directed, and leave the writ of summons and seisin at the *Return Office* to be returned. In the mean time pass the recovery at bar; for which purpose make out a *præcipe* in paper in the usual form.

“ Kent, to wit. Command A. B. that justly, &c. he render to C. D. (*parcels*), which he claims.

“ Tenant, by E. F. his attorney,

“ vouches to warranty F. G.,

“ who, by L. M. his attorney,

“ vouches over to warranty

“ Thomas Francis Martin.”

Deliver *præcipe* to a serjeant in court, having warrant of attorney acknowledged with you, and the serjeant will pass it at bar.

The form of the entry on the roll is as follows:—It is divided into two entries, first the entry of the count against the tenant, and the award of the summons against the vouchée; and then, as the summons is made returnable four terms afterwards, as above mentioned, there is a second entry of the appearance by attorney of the vouchée, and the demandant's count against him, and against the common vouchée, as in the usual form. The first is called the first entry, or summons roll; the second, the entry of the recovery.

The form is as follows:

" Kent, to wit. C. D. in his proper person demandeth
" against A. B. &c. (*count in the common form*).

" And the aforesaid A. by E. F. his attorney cometh
" and defendeth his right, when, &c. and thereupon
" voucheth to warranty F. G. summoned in the county
" aforesaid; let him have him here on the octave of St.
" Martin, by the aid of the court, &c. The same day is
" given to the parties aforesaid here," &c.

Second Entry.

" Kent, to wit. C. D. in his proper person demandeth
" against A. B. &c. (*count as before*).

" And the aforesaid A. by E. F. his attorney cometh, and
" has heretofore vouched thereupon to warranty F. G.
" who now by summons made to him in the county aforesaid also
" cometh by L. M. his attorney, and freely warranteth to him
" the tenements aforesaid, with the appurtenances, &c.
" And hereupon the aforesaid C. D. demandeth against the
" said F. G., tenant by his own warranty, the tenements
" aforesaid, with the appurtenances, &c. and whereupon he
" says, that he was seised, &c." (*so on as in the usual entries of
recoveries*).

*Of the Tenant and Vouchee appearing by Attorney, the
Tenant acknowledging the Warrant before a Judge, and
the Vouchee acknowledging it before Commissioners by
Dedimus.*

In this case, with regard to the tenant, proceed as before
directed in preparing *præcipe* and warrant, and getting it
acknowledged before a judge; and also procure writ of sum-
mons. And with regard to the vouchee, make out *præcipe*
for the *dedimus* as follows;—

" Kent, to wit. Command A. B. that justly, &c. he
" render to C. D. (*parcels*), which he claims, &c.

" <i>Dedimus potest.</i> for F. G.	} Directed to	Sir W. X. knt.
" whom A. B. vouches		N. O.
" to warranty.		P. Q.
		R. S.
		T. U."

Deliver this to the curfitor of the county where lands lie,
and he will make out writ.

Then engross on parchment warrant of attorney for vouchee, thus:—

“ Kent, to wit. Command A. B. that justly, &c. he render to C. D. (*parcels*) which he claims,” &c.

“ Kent, to wit. F. G., whom the said A. B. vouches to warranty, puts in his place L. M. and O. P. his attornies, jointly and severally, against C. D., to gain or lose in a plea of land. Taken and acknowledged,” &c.

The dedimus being returned, and a mittimus and transcript thereof made by the curfitor, pass the recovery at the bar as before directed.

The form of the entry is in this case as follows:—The first entry or summons roll is the same as in the last case, consisting of the demandant's count against the tenant, and the award of the summons against the vouchee. Then, on another roll, enter the mittimus and transcript (in a small hand) *verbatim* (as before directed, page 501); and then, *leaving the distance of an inch on the same roll, go on thus in a large hand*—

Elsewhere, as it appears in this same term on the roll, it is thus contained:—

“ Kent, to wit. C. D. in his proper person demandeth against A. B.,” &c. And so on with the whole entry of recovery.

Of the Tenant and Vouchee appearing by Attorney on Warrants taken by Dedimus.

In this case prepare two *precipes* for *dedimus*, one for the tenant and the other for vouchee, in the same way as last directed for vouchee only (*mutatis mutandis*); and also two *precipes* and warrants of attorney, and sue out two writs of *dedimus*, and get a mittimus and transcript of each of them made by the curfitor, and pass recovery at bar as above directed.

In the entry, the only difference is, that in the first entry or summons roll, the mittimus and transcript of the *dedimus* for the tenant's acknowledgment of warrant is first engrossed; then the count and summons against vouchee, and then in the second entry the mittimus and transcript of the *dedimus* for vouchee's acknowledgment of warrant, and the proceedings of recovery as above shewn.

Thus, by observing the above directions, the proceedings in every particular case and the forms of the entries may be easily

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easily collected, whether the recovery is suffered by the parties appearing in person, or by attorney; and whether the warrant of attorney is taken before a judge, or before commissioners; and this by both tenant and vouchee, or by one of them only.

If the recovery be with treble or more vouchers, the vouchers appearing by attorney.

The mode of proceeding is as above, *mutatis mutandis*, having separate *precipes*, warrants for each vouchee, and a *dedimus* for each, if the warrant be taken before commissioners.

In the entry of the recovery there must be three different entries; the first summons roll against first vouchee, a second summons roll against the second vouchee, and then the entry of the recovery itself; the same as above, *mutatis mutandis*, having as many entries of summons rolls as there are vouchers, and entering thereon the transcript of mittimus, &c. to each, if the case requires it. See Will. 421.

Of stopping, and searching for, Recoveries.

To stop a recovery from being suffered, enter *caveat* at Prothonotary's and King's Silver Office, when notice will be given you of the proceedings therein; but leave of the court should be obtained to enter such *caveat*.

Search for recoveries at Warrant of Attorney's Office; though no warrant of attorney is filed there in suffering recoveries, as there is in passing fines.

Of reversing Recoveries.

The judgment in a common recovery being a matter of record, it can only be reversed by writ of error.

No one is entitled to bring such writ of error, unless he has an immediate interest in the lands whereof the recovery was suffered.

Nor can any thing be assigned for error which contradicts the record, therefore no incapacity in a vouchee, if he appeared in person, can be assigned; but otherwise if he appeared by attorney, for then any fact may be averred which would incapacitate such vouchee from making the warrant, or would render the recovery of no effect, as the personal disability of vouchee, or his death before judgment given.

The doctrine of fines and recoveries is both copious and intricate. For further information thereon, we must refer the reader to the various books that have been written upon the subject, the design of this work being chiefly to give a brief explanation of the *practical proceedings* in passing fines and suffering recoveries. We shall conclude with a table or modus of the returns of the several writs in a recovery, with a few observations thereon, rendering the table applicable to all cases.

A TABLE

A TABLE or MODUS for the Returns of Writs in a Recovery.

In a Recovery where all the Parties appeared at Bar.

Michaelmas Term.

Writ of Entry returnable

1. On the Morrow of All Souls.
2. On the Morrow of St. Martin.
3. On the Oclave of St. Martin.
4. From the day of St. Martin in 15 days.

Writ of Seisin returnable

1. From the day of St. Martin in 15 days.
2. Without delay.
3. Without delay.
4. On the Oclave of St. Hilary.

Hilary Term.

1. On the Oclave of St. Hilary.
2. From the day of St. Hilary in 15 days.
3. On the Morrow of the Purification of the Blessed Mary.
4. On the Oclave of the Purification of the Blessed Mary.

On the Oclave of the Purification of the Blessed Mary.

1. Without delay.
2. Without delay.
3. Without delay.
4. From the day of Easter in 15 days.

Easter Term.

1. From the day of Easter in 15 days.
2. From the day of Easter in three weeks.
3. From the day of Easter in one month.
4. From the day of Easter in five months.
5. On the Morrow of the Ascension of our Lord.

1. From the day of Easter in five Weeks.
2. On the Morrow of the Ascension of our Lord.
3. Without delay.
4. Without delay.
5. On the Oclave of the Holy Trinity.

Trinity Term.

1. On the Morrow of the Holy Trinity.
2. On the Oclave of the Holy Trinity.
3. From the day of the Holy Trinity in 15 days.
4. From the day of the Holy Trinity in three weeks.

From the day of the Holy Trinity in three weeks.

1. Without delay.
2. Without delay.
3. Without delay.
4. On the Morrow of All Souls.

In a Recovery where the Vouchee comes in by Summons.

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Michaelmas Term.

Writ of Entry returnable

1. On the Morrow of All Souls.
2. On the Morrow of St. Martin.
3. On the Octave of St. Martin.
4. From the day of St. Martin in 15 days.

Writ of Summons returnable

1. From the day of St. Martin in 15 days.
2. On the Octave of St. Hilary.
3. From the day of St. Hilary in 15 days.
4. On the Morrow of the Purification of the Blessed Mary.

Writ of Seisin returnable

1. On the Octave of St. Hilary.
2. On the Morrow of the Purification of the Blessed Mary.
3. Without delay.
4. Without delay.

Hilary Term.

1. On the Octave of St. Hilary.
2. From the day of St. Hilary in 15 days.
3. On the Morrow of the Purification of the Blessed Mary.
4. On the Octave of the Purification of the Blessed Mary.

1. On the Octave of the Purification of the Blessed Mary.
2. From the day of Easter in 15 days.
3. From the day of Easter in three weeks.
4. From the day of Easter in one month.

1. From the day of Easter in 15 days.
2. From the day of Easter in five weeks.
3. On the Morrow of the Ascension of our Lord.
4. Without delay.

Easter Term.

1. From the day of Easter in 15 days.
2. From the day of Easter in three weeks.
3. From the day of Easter in one month.
4. From the day of Easter in five weeks.
5. On the Morrow of the Ascension of our Lord.

1. From Easter day in five weeks.
2. On the Morrow of the Ascension of our Lord.
3. On the Morrow of the Holy Trinity.
4. On the Octave of the Holy Trinity.
5. From the day of the Holy Trinity in 15 days.

1. Without delay.
2. On the Octave of the Holy Trinity.
3. From the day of the Holy Trinity in three weeks.
4. Without delay.
5. Without delay.

Trinity Term.

1. On the Morrow of the Holy Trinity.
2. On the Octave of the Holy Trinity.
3. From the day of the Holy Trinity in 15 days.
4. From the day of the Holy Trinity in three weeks.

1. From the day of the Holy Trinity in three weeks.
2. On the Morrow of All Souls.
3. On the Morrow of St. Martin.
4. On the Octave of St. Martin.

1. On the Morrow of All Souls.
2. From the day of St. Martin in 15 days.
3. Without delay.
4. Without delay.

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Observations on the Returns.

The writ of seisin must bear teste the fourth day inclusive after the return of the writ of entry, or last writ of summons, not being on Sunday, or *dies non juridicus*, and must have 15 days between the teste and return. Of the writ of seisin.

Dies non juridici are all days out of term, All Saints and All Souls in Michaelmas term, the Feast of the Purification in Hilary term, Ascension Day in Easter term, and the Feast of St. John the Baptist, if it happen in Trinity term.

If there be not 15 days between the return of the writ of seisin and the end of that term wherein it bears teste, it must be made returnable without delay; and if the seisin be tested the last day of any term, it must be made returnable the first return of the next term.

The writ of summons must bear teste also the fourth day inclusive from the return of the writ of entry, as is said before with regard to the writ of seisin, and there must be four returns between the return of the writ of entry, and the return of the writ of summons, as may be seen by the above table or modus, reckoning the return of the writ of entry and return of the writ of summons for two of the four returns. Of the first writ of summons.

If the recovery be with treble voucher, and the first and second vouchees appear upon summons, the last writ of summons must bear teste the fourth day inclusive after the return of the first writ of summons; and there must be four returns inclusive between the return of the first writ of summons, and the return of the last writ of summons, reckoning the returns of the first writ of summons and of the second as two of the four returns; and for the finding out such fourth return of the last writ of summons, and the return of the writ of seisin, by the foregoing table or modus, look for the return of the first writ of summons in the first column on the left hand of the last table, and opposite thereto you will find the fourth return inclusive, which is to be the return of the second writ of summons; and opposite to that you will find the proper return of the writ of seisin. Of the second writ of summons.

The above directions will serve in all cases, whether the recovery be with four, five, or any number of vouchers.

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